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In the

Supreme Court of the United States

OCTOBER TERM, 1952

No. 541

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES,

Petitioner,

v.

H. N. BORDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

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v.

H. N. BORDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

Local 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, entered in this cause on February 9, 1962.

OPINIONS BELOW

The opinion rendered by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on February 9, 1962 affirming damage judgment against Petitioner is reported at 355 S. W. 2d 729, and is printed in Appendix A at pages 1a

to 18a. On July 25, 1962 the Supreme Court of Texas denied writ of error without opinion.[1]

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Judicial District of Texas was entered on February 9, 1962.

The Supreme Court of Texas refused timely application for Writ of Error on July 25, 1962, making final the decision of the Court of Civil Appeals (App. B, p. 1b).

The jurisdiction of this Court is invoked under *28 USC 1257 (3)*, in that the Courts of Texas have upheld a damage award against a union based upon a controversy that is subject to the exclusive jurisdiction of the federal regulatory agency created by the Labor Management Relations Act of 1947.

QUESTION PRESENTED

Does a state court have jurisdiction to award compensatory and punitive damages against a labor union for its refusal to issue a job referral to a member, which refusal resulted in denial of employment by an employer whose operations affect interstate commerce? Is such conduct by a labor

[1] Earlier opinions of the Texas appellate courts in the case, reviewing the trial court's original dismissal of the suit on the ground, among others, of federal pre-emption are also appended, viz:

Unreported opinion of the Dallas Court of Civil Appeals rendered April 11, 1958, sustaining defendants federal pre-emption plea, Appendix A, p. 57a, *infra*.

Opinion of the Dallas Court of Civil Appeals rendered July 25, 1958, reported at *316 S. W. 2d 458*, withdrawing its opinion of April 11, 1958, and remanding for trial on the merits, Appendix A, p. 51a, *infra*.

Opinion of the Supreme Court of Texas, *160 Tex. 203, 328 S. W. 2d 739*, rendered November 4, 1959, affirming remand for trial on the merits, Appendix A, p. 19a, *infra*.

union "potentially subject to the exclusive federal regulatory scheme" expressed in the Labor Management Relations Act of 1947, and thus limited to the exclusive jurisdiction of federal tribunals under the federal Act?

CONSTITUTION—STATUTES INVOLVED

The Constitutional provision involved is the Supremacy Clause, Art. VI, Clause 2, reprinted in Appendix E, p. 1e.

The statutory provisions involved are Sections 2(2), (3), (7), 8(a)(3), 8(b)(1)(A), 8(b)(2), and 10(a) of the Labor Management Relations Act of 1947, *61 Stat. 136 et seq.; 29 U.S.C., §152(2), (3), and (7); §158 (a)(3), (b)(1)(A), (b)(2); 160(a)*. Reprinted in Appendix E, pp. 1e to 5e.

STATEMENT OF THE CASE

The Texas state courts have denied pleas of federal preemption and assumed jurisdiction to award actual and punitive damages[2] to H. N. Borden, against the labor union of which he is a member, based on a refusal to "refer" Borden to a job on a construction project which affected interstate commerce.

Plaintiff Borden's petition asserted (Tr. 6)[3]; (1) that the union had denied him rights of membership by refusing to "clear" him into the Dallas local union, and (2) that union thereafter denied him employment by refusal to issue a "referral" necessary to obtain employment with Farwell

[2]The jury found $1,960 actual damages; $1,500 mental anguish; plus $5,000 punitive damages (Tr. 36, 37, 38) (Damage issue submission, Appendix C, pp. 7c-10c). The trial judge excised the mental anguish award, and reduced the punitive to equal the actual damages found. Thus judgment was entered for $3,832.00 plus interest.

[3]Tr. refers to "transcript" the compilation of pleadings and orders in the trial court.

Construction Co., which employment Farwell's foreman had offered to him, subject to obtaining union referral (Tr. 6, 5).

The jury found (Tr. 34) that union had *not* refused to clear Borden into the local. There is thus no question in the case as to the acquisition or retention of union membership rights.

Judgment against the union for actual and punitive damages was based on jury findings that Borden was promised a job by the authorized foreman of Farwell (Tr. 33, App. C, p. 4c); that Farwell placed a call with the union for Borden to be issued a referral to work for Farwell (Tr. 34, App. C, p. 5c); that the union agent, Lanham, refused to issue a referral to permit Borden to work for Farwell (Tr. 34-35, App. C, p. 6c); and that the union ratified Lanham's conduct (Tr. 35; App. C, p. 7c).[4]

The Farwell employment clearly affected interstate commerce. It is stipulated (S. F. 315) that in construction of the Republic Bank, at which Borden sought employment, employer Farwell purchased materials having a value of over half a million dollars, which materials were manufactured in states other than Texas and transported in interstate commerce from points outside the State of Texas to the Republic Bank job site in Dallas, Texas, where they were installed by Farwell employees (S. F. 317).[5]

[4] No finding was made as to the cause of the refusal to refer by the jury or by either the trial or appellate courts.

[5] NLRB asserts jurisdiction over any industry which has an annual inflow across State lines of at least fifty thousand dollars. *In re Man Products, 128 NLRB 546.*

S. F. refers to "Statement of Facts" the stenographic Record of the trial.

HOW FEDERAL QUESTION IS PRESENTED

The union challenged the state court's jurisdiction by appropriate plea to the jurisdiction (App. D, p. 1d, *infra*) and the trial court initially dismissed the suit, holding, *inter alia*, that "jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction." (App. A, p. 37a).

The Texas Court of Civil Appeals affirmed in an unreported opinion rendered April 11, 1958 and reproduced *infra* at App. A, p. 57a.

Before this opinion became final, and while the cause was pending on rehearing in the Court of Civil Appeals, the Supreme Court of the United States on May 26, 1958, decided *International Ass'n of Machinists v. Gonzales, 356 U. S. 617.*

The Texas Court of Civil Appeals thereupon withdrew its earlier opinion, and on July 25, 1958, substituted an opinion reported at *316 S. W. 2d 458* (App. A, p. 51a, *infra*), citing *Gonzales*, and holding "that the State Court has jurisdiction of appellant's suit." *316 S. W. 2d 461*,* and remanded for trial on the merits.

*The Supreme Court of Texas granted writ of error on another point, and in an opinion (which does not treat of the jurisdictional issue) affirmed the Court of Civil Appeals and remanded the case for jury trial. See *328 S. W. 2d 739*, opinion of November 4, 1959, reproduced at Appendix A, p. 19a, *infra*.

On remand the jurisdictional pre-emption point was again presented by plea to the jurisdiction in amended answer of Local 100 (Tr. 22-23, App. D, p. 2d) and by motion for new trial (Tr. 141, App. D, p. 2d), and overruled in both instances.

On appeal from final judgment after jury trial, the union's first point of error was "The Court did not have jurisdiction of the instant lawsuit."[1] The Texas Court of Civil Appeals addressed itself to the federal pre-emption issue and, again relying on *Gonzales*, expressly overruled the challenge to state jurisdiction by holding the federal law does not pre-empt—that the federal law is inapplicable in that (a) Borden was not an "employee" within the meaning of the federal law, since he was merely an applicant for employment, and (b) that the discrimination was not of the type proscribed by federal law since Borden was already a member of the union. Specifically, the Court stated, in overruling the federal pre-emption point: "By plain wording of the [Federal] Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member." *355 S. W. 2d 729 at 733*, App. A, p. 5a, *infra*. The Court held as to the jurisdictional pre-emption claim: "Appellant again asserts exclusive application of 29 U.S.C.A. § 151, et seq. (Taft-Hartley) to this lawsuit. * * * The point is again overruled." *355 S. W. 2d at 732, 733.*

Application for writ of error to the Supreme Court of Texas asserted as point of error number one: "The Court of

[1] Appellant's Brief to the Court of Civil Appeals, p. 7.

Civil Appeals erred in holding that the State Courts have jurisdiction of the instant lawsuit."[8] The Supreme Court of Texas denied writ of error without opinion.

REASONS FOR GRANTING THE WRIT

A.

The Importance of the Question

Specification of the boundaries between state and federal jurisdiction over labor relations matters within the orbit of federal legislation is of such importance as to have long occupied this court.[9] Guidelines have been marked with respect to competence to control picketing, other forms of employee concerted activity, and union-employer controversies by the opinions of this Court cited in note 9.[10]

But jurisdiction as to equally important and frequently recurring controversies between unions and their members

[8]Petitioner's Application for Writ of Error, 1962, pp. 7 ff.

[9]*Marine Engineers Ass'n v. Interlake Steamship Co.,* U. S. , 8 L. Ed. 2d 418 (June 11, 1962); San Diego Bldg. Trades v. Garmon, 359 U. S. 236; Youngdahl v. Rainfair, 355 U. S. 131; Cavett v. Machinists, Lodge 34, 355 U. S. 39; Farnsworth & Chambers Co. v. Electrical Workers, 353 U. S. 969; Teamsters Local Union v. Kerrigan Iron Works, 353 U. S. 968; Garmon v. San Diego Bldg. Trades, 353 U. S. 26; Guss v. Utah Labor Relations Board, 353 U. S. 1; Newberry Co. v. Retail Clerks, Local 560, 352 U. S. 987; Elle Construction Co. v. Pocatello Bldg. Trades Council, 352 U. S. 884; Teamsters Local Union 25 v. New York, N.H. & H.R. Co., 350 U. S. 155; Weber v. Anheuser Busch, Inc., 348 U. S. 468; United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656; Kinard Construction Co. v. Building Trades Council, 346 U. S. 933; Garner v. Teamsters, 346 U. S. 485; Amalgamated Ass'n S.E.R. M.C.E. v. Wisconsin Employment Relations Board, 340 U. S. 416; International Union Auto Workers v. O'Brien, 339 U. S. 454; Hill v. Florida, 325 U. S. 538.

[10]Texas has been reluctant to follow these guides. See *Ex Parte George, Tex. , 358 S. W. 2d 590,* where Texas Courts assert jurisdiction to jail a union member for engaging in picketing activity either protected or prohibited by the Federal Act. We understand that application for certiorari is presently pending in that case.

has not been so clearly marked. The extent to which the federal legislation has excluded the exercise of state power in granting relief to a union member for damage resulting from union discrimination has been determined only once by this court. In *International Association of Machinists v. Gonzales, 356 U. S. 617 (1958)* a divided Court upheld state competence "to determine and enforce the rights of union membership." *356 U. S. at 620.* The *Gonzales* opinion recognized "The Delphic nature" of "the statutory implications concerning what has been taken from the states and what has been left to them" and left to the future "process of litigating elucidation" the drawing of more specific boundaries. *356 U. S. at 619.*

The light from such litigation (which has been profuse in the state courts since *Gonzales)* leaves much in shadow, and, depending upon which state beacon is the source of the illumination, results in conflict and confusion.

Thus, in the instant case, pre-*Gonzales*, the Texas state courts held the matter pre-empted. But in the latest post-*Gonzales* opinion (App. A, p. 1a, *infra*) the Texas Court narrowly, and erroneously, construes the federal statute and affirms state jurisdiction by misapplying *Gonzales*, although neither the issues nor the facts are apposite.[11]

[11] As we detail, *infra*, p. 14 ff., the instant case involves only discrimination in employment, fully covered by the federal statutory scheme. While plaintiff's petition also claimed rights "with respect to the acquisition or retention of membership therein" (the right vindicated by the state in *Gonzales*), that aspect went out of the case with the jury's finding #3 (Tr. 34) that Borden had not been denied clearance into the local. All that was left was the claim of discrimination as to employment which was fully covered by the federal Act. See *Radio Officers Union v. NLRB, 347 U. S. 17, 33, 42 (1954); NLRB v. Local 1423, etc., 238 F. 2d 832 (C.A. 5, 1956); Plumbers, etc. Local 100, et al. v. Breland, 128 NLRB 398 (1960); enforced, 291 F. 2d 927 (C.A. 5, 1961).*

Texas is not alone in its misapplication of *Gonzales*. Arizona, Idaho, Kansas, California, Ohio and North Caroline have construed *Gonzales* as giving license to the states to entertain virtually any damage suit by a member against his union. While courts in Pennsylvania, New Jersey and New York have concluded that the federal remedy is exclusive.

We briefly note a sample of the post-*Gonzales* conflicting state cases. The following uphold state jurisdiction:

In *Sheetmetal Workers v. Nichols, 89 Ariz 187, 360 P. 2d 204 (1961)*, the Arizona Supreme Court considered *Gonzales* to stand for the proposition that states enjoyed "concurrent jurisdiction" with the NLRB over matters admittedly constituting unfair labor practices under §8(b) (2) and 8(a) (3) of LMRA.

In *Lockridge v. Motor Coach Employees, 369 P. 2d 1006, I.D.A. (1962)*, the Idaho Supreme Court concluded that *Gonzales* permitted the state court to maintain an employee's suit for compensatory damage based upon an allegation of discharge at union request under a union shop provision, following suspension from the union for dues arrearage.

The Kansas Supreme Court recently overruled a preemption plea where plaintiff alleged, as a consequence of conspiracy between union and employee, he was deprived of employment because of lack of union membership. *Taylor v. Hoisting Engineers, Local 101, 189 Kan. 137, 368, P. 2d 8 (1962).*

Similar aberrations regarding the meaning of the *Gonzales* case appear in *Allen v. Los Angeles County Carpenters, 51 Cal. 2d 811, 337 P. 2d 457 (Cal. S. Ct. 1959)*, (individual suit against employer and union in which the court below found the action pre-empted as to the employer, but sustained jurisdiction with respect to the union); *Perko v. Local 207, Ironworkers, 168 Ohio St. 161, 151 N. E. 2d 742 (Ohio S. Ct. 1958)*, (sustains state jurisdiction in *tort* action which court recognizes could constitute an unfair labor practice); *Willard v. Huffman, 250 N. C. 396, 109 S. E. 2d 233 (N. C. S. Ct. 1959), cert. denied 361 U. S. 893.* (Apparently, the employer's operations fell in the then existing "no man's land" between NLRB and state jurisdiction).[12]

Other states hold similar suits pre-empted, viz:

The Supreme Court of Pennsylvania recently found pre-empted an ex-member's suit against his union for reinstatement and loss of earnings resulting from expulsion. In so doing the court concluded that "the rationale underlying the *Gonzales* decision has been almost entirely obliterated by the subsequent holding in the second *Garmon* case." *Wax v. International Mailers Union, 400 Pa. 173, 161 A. 2d 603 (1960).*

A New Jersey Court declined jurisdiction over a suit by employees and their union alleging breach of contract by their employer and malicious interference with the contract by another union, concluding that the conduct

[12]The Congress has since eliminated the "no man's land" by §701 of the Labor Management Reporting and Disclosure Act of 1959. Public Law 86-257, 86th Cong. S 1555, Sept. 14, 1959, 73 Stat. 541; 29 U.S.C. §164.

arguably constituted an unfair labor practice. *Hod Carriers Local 502 v. Park Arlington Corp., 73 NJS 433, 180 A. 2d 181 (1962).* A New York Appellate Court declined jurisdiction on facts quite similar to those before the Idaho Supreme Court in *Lockridge v. Motor Coach Employees, 369 P. 2d 1006, supra, p. 9,* i.e. alleged invalid expulsion from union membership causing loss of employment under union shop agreement. *Green v. Folks, 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961).*

Thus the "process of litigating elucidation" concerning the boundaries between state and federal powers in suits by union members against unions is producing the very regional variations which the federal regulatory scheme was designed to eliminate.

B.

The Texas Decision Is Not in Accord With Applicable Decisions of This Court

(1) *State intrusion in matters this Court has traditionally recognized subject to Federal control.*

The Texas Courts deal with a union's "discriminatory course of conduct * * * consisting of the refusal of the union to * * * refer him (Borden) to a job offered him in the construction of the Republic National Bank Building" *(335 S. W. 2d 729 at 731;* App. A, p. 1a, *infra)* by awarding actual and punitive damages to the member subject to such discrimination.

Federal tribunals, applying the *federal* statute, deal with the identical "discriminatory course of conduct" by requiring offer of employment and back pay. Myriad decisions of the NLRB and the federal courts apply section 8(b)(2) of the Federal Act to unions which deny "referral" to their members. *Radio Officers Union v. NLRB*, 347 U. S. 17 (Fowler's case) finds on facts similar to those at bar a violation of the Federal Act, viz:

> "• • • refusal of clearance caused the company to discriminate against Fowler [then a member of the union] in regard to hire. Without the necessary clearance it could not accept him as an employee. The result was to encourage membership in the union." *347 U. S. at 33.*

The very local union, here petitioning for certiorari, was held by the NLRB to have violated Section 8(b)(2) of L.M.R.A. with respect to one Breland who "was unable to start working because his employment had been conditioned upon his obtaining a work order or clearance from the Respondent Union and that he had been unable to secure the necessary order" 128 NLRB 398 at 399 (1960). The NLRB order requiring this union to make Breland whole for loss of pay resulting from refusal to grant him a referral was enforced by the Court of Appeals. *NLRB v. Local 100, Plumbers, 291 F. 2d 927 (C.A. 5, 1961).*

Union "hiring hall" or "referral" procedures are almost daily being tested under the Federal Act by the NLRB. A large body of federal law with respect to these practices is already in the books. Most recently this Court met the problem of applying the federal law to such union activities

in the *Mountain Pacific* case.[13] The NLRB, the federal Courts of Appeals and this Court have built a large body of federal case law by which allegations of discrimination in operation of referral systems are to be and are being tested.[14]

For Texas tribunals to assert jurisdiction and to apply Texas law to similar claims is directly contrary to the holding of this Court in the second *Garmon* case, *San Diego Bldg. Trades, etc. v. Garmon, 359 U. S. 236*, viz.:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard of the Federal enactment requires that state jurisdiction must yield."

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[13] *Local 357, Teamsters v. NLRB, 365 U. S. 667.*

[14] *NLRB v. Local 340, Electrical Workers, 301 F. 2d 824 (C.A. 9—1962); NLRB v. Local 392, Plumbers, 277 F. 2d 56 (C.A. 7—1960); NLRB v. Local 542, Operating Engineers, 255 F. 2d 703 (C.A. 3—1958); NLRB v. Local 1423, Carpenters, 238 F. 2d 832 (C.A. 5—1956); NLRB v. Philadelphia Iron Works, 211 F. 2d 937 (C.A. 3—1953); c/f NLRB v. Local 419, Painters, 242 F. 2d 477 (C.A. 10—1957); NLRB v. Local 420, Plumbers, 239 F. 2d 327 (C.A. 3—1956); NLRB v. Jarka Corp., 198 F. 2d 618 (C.A. 3—1952).*

Without attempting to detail the numerous NLRB decisions testing the legality of union referral procedures and hiring hall practices, the frequency of the occurrence of the question can be demonstrated by a statement contained in a recent Annual Report of the NLRB.

> "As in prior years, a substantial number of the cases against unions arose from complaints alleging contractual or informal arrangements under which the participating employer was to give preferential treatment to the union's members, or the union was to have control over such matters as hiring and seniority. The maintenance of agreements which in effect condition employment or employment benefits on union membership and compliance with union rules—other than as permitted by the act's union-security provisions—has consistently been held violative of the nondiscrimination provisions of section 8(b)(2) and 8(a)(3) in that such arrangements inevitably encourage union membership * * *."

Twenty-Fifth Annual Report of the National Labor Relations Board—at p. 90 (1961); c/f Twenty-Sixth Annual Report of the National Labor Relations Board at p. 121 (1962).

This limitation obtains "regardless of the mode adopted" by the states to express or enforce the state policy.

(2) *Misconstruction and Misapplication of Decisions of This Court.*

This record is not a repetition of *Gonzales*, wherein the Court permitted state control of a claim for restoration of union membership.

Borden was not denied membership. His pleadings so asserted (Tr. 7), but the jury found he had not been denied clearance into the union. The acceptance of his clearance card made him in all respects a member of Local 100.[15] His complaint, then, and the judgment which we assert to be erroneous, dealt only with the union's blocking his employment.

Both the majority and the dissent in *Gonzales* recognize that such complaints are for exclusive federal determination. For as the majority noted: "The [Gonzales] suit did *not* purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the [federal] Board is concerned to strike at as an unfair labor practice under §8(b)(2)," *356 U.S. at 622*; and "the state court proceedings [in Gonzales] deal with arbitrariness and misconduct vis-a-vis the individual union member and the union; the *Board* proceedings, looking principally to the *nexus between union action and employer discrimination* * * *" *356 U. S. at 622, 623* (Emphasis added).

[15] See Jury finding #3 (App. C, p. 5c, Tr. 34); and Opinion of Texas Court of Civil Appeals, *355 S. W. 2d at 732*, App. A, pp. 5a, 7a, *infra*.

This is the sole nexus upon which Borden's state court recovery is predicated: union refusal to refer, causing employer refusal to hire, i.e. discrimination in violation of 8(b)(2) and 8(a)(3) of the federal Act. Clearly, then, the Texas courts have misconstrued and misapplied *Gonzales*.

Texas' attempt to retain jurisdiction by interpreting the federal Act so narrowly as to exclude from federal protection applicants for employment (as distinguished from "employees"), is in direct conflict with *Phelps-Dodge Corp. v. NLRB, 313 U. S. 177*, where this Court held applicants for employment to be "employees" within the protection of the federal statute.

Similarly, the narrowing of the federal statute to protect against discrimination only those who are not union members, viz.: "By plain wording of the (federal) Act the discrimination must be limited to purpose of encouragement or discouragement of membership in the union *and plaintiff was already a member*," *355 S. W. 2d at 733*; App. A, p. 5a, *infra* (emphasis added)—runs counter to this Court's application of the federal Act to protect union members (as well as non-members) in *Radio Officers Union v. NLRB, 347 U. S. at 33*.

Finally, the Texas Court's remedy (private damages, both actual and punitive), serves to demonstrate the evil inherent in state action in areas pre-empted to federal control. For the state court did not—and could not—require the union to purge its §8(b)(2) violation, to post remedial notices, and to "cease and desist" from activities which the federal law holds inimicable to the public interest. Thus, Borden's private interest was improperly served, and the public interest served not at all.

CONCLUSION

For the foregoing reasons it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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DATED: October 17, 1962.

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of October 1962, a true and correct copy of the foregoing was served upon counsel for respondent, Messrs. Lyne, Blanchette, Smith & Shelton, Adolphus Tower Building, Dallas, Texas, by personally delivering same to their offices.

L. N. D. WELLS, JR.

APPENDIX A

Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas
Delivered February 9, 1962

No. 15,930

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, ET AL.,
Appellants,

v.

H. N. BORDEN,
Appellee.

From a District Court of Dallas County.

This is a damage suit brought by Borden, appellee, against two unincorporated labor unions—appellant Local 100 and the parent body of similar name. Borden sought money damages both actual and punitive, for loss of earnings and mental anguish, arising out of allegedly wilful, malicious and discriminatory course of conduct of the two unions; same consisting of the refusal of the unions to treat appellee as any other union member and to refer him to a job offered him in the construction of the Republic National Bank Building. His suit is based on allegations involving both tort and contract.

This suit had been previously dismissed by the trial court on plea in abatement, and on appeal to this Court was reversed and remanded to the trial court for trial to the merits. On writ of error granted by our Supreme Court, the opinion of reversal was affirmed; it holding that a cause of action would lie if plaintiff "was wilfully denied a job opportunity to which Lanham, the Local Union Business Manager, knew he was entitled under the rules and procedures established by petitioners for allocating work among their members, and that petitioners either conspired with Lanham to bring this about or otherwise authorized or ratified his wrongful conduct * * * *." United Association of Journeymen, et al. v. Borden, Tex. Sup. Ct., 328 SW 2d 739; see also 316 SW 2d 458 for further background of case and conclusions of this Court.

The facts material to appellee's claim of injury are generally outlined in the following summary of the numbered jury issues and answers: (1) that on or about Sept. 16, 1953 plaintiff Borden was promised a job on the Republic National Bank Building by the authorized foreman of the Farwell Construction Company; (2) that at a time when plaintiff was available for work, a call was placed by A. G. Turman calling for plaintiff to go to work upon said Republic Bank Building; (3) that defendant Local Union 100 by and through its business manager Cleo Lanham, thereafter did not refuse to accept plaintiff's clearance card from his local union in Shreveport, Louisiana; (5) that said defend-

ant Local Union 100 wrongfully refused to let plaintiff work on said Republic Bank Building; (6) that such refusal was made at a time when said Cleo Lanham knew that under the rules of said local union plaintiff was entitled to work on said bank building; (7) that such refusal to let the plaintiff work on said bank building was *not* without any cause or reason whatsoever; (8) that with full knowledge of the conduct of Cleo Lanham concerning plaintiff, the officers and members of defendant Local Union 100 approved such conduct; (9) that had plaintiff been allowed to work on the Republic Bank Building from Sept. 15, 1953 to Sept. 15, 1954 he would have earned $5,856; (10) plaintiff earned, or by use of reasonable diligence, could have earned during same period the amount of $3,940; (11) that plaintiff, by being denied the Republic Bank job opportunity, suffered mental anguish; (12) which was proximately caused by defendants Local Union 100; (13) reasonable compensation for the mental anguish suffered was $1500; (14) that plaintiff should be awarded $5,000 as punitive damages against defendant Local Union 100; (15) that plaintiff, after having been refused the job opportunity to work on the Republic Bank Building, *did fail* to pursue his grievance within the rules and procedures of said Local Union 100 that were available to him; (16) that plaintiff voluntarily accepted other work in October 1953 upon referral from defendant Local 100 without complaint; (17) but that plaintiff *did not* acquiesce in defendant Local 100 actions; (19) plaintiff *did not* fail to apprise defendant Local 100 of his complaints;

(22) that it would have been useless for plaintiff to have pursued his complaint within the rules and procedures of the defendant Local 100.

In this connection the court overruled the motion for summary judgment of Local Union 100 seasonably filed and carried along to close of evidence; also its motion for judgment on the verdict; and in the alternative, its motion for judgment non obstante veredicto. Plaintiff's motion to disregard jury answer to Issue No. 7 and for judgment on remainder of the jury verdict was sustained; holding however that in a suit of this type the issue of mental anguish was not raised and should not have been submitted; also that the amount of punitive damages so found was excessive; and that plaintiff should be required to reduce the punitive damages to an amount not exceeding the actual damages sustained, or a total judgment of $3,832 to which plaintiff duly excepted, defendant Local Union 100 likewise excepting to all of above adverse rulings. A peremptory instruction had been given in favor of the parent union to which plaintiff duly excepted.

Appellant again asserts exclusive application of 29 U.S.C.A. § 151, et seq., (Taft-Hartley Act) to this lawsuit. (Footnote).

In this plea to the jurisdiction it is argued that answer to Issue No. 5—wilful refusal of defendant Local Union 100 through Lanham that the plaintiff work on said Republic Bank Building--constituted an unlawful labor practice within provisions of Section 158 (b), which reads: "It shall be

an unfair labor practice for a labor organization or its agents * * * '(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section * * *.' The material part of subsection (a) (3) of § 158 reads as follows: 'It shall be an unfair labor practice for an employer—' (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:' * * *."

The suit of Borden as already stated was based on both contract and tort. Even if Borden be considered an employee, which appellee denies, Farwell Construction Company, the contractor and employer, was not a party to the suit and there is no evidence that it practiced any discrimination against Borden or treated him anywise different from other employees. He was simply offered a job and requested to obtain a referral from Local Union 100 as were all other employees of Farwell. By plain wording of the Act, the discrimination must be limited to purpose of encouragement or discouragement of membership in the union and plaintiff was already a member. This is a suit for wrongs allegedly committeed against plaintiff by arbitrary conduct of Local Union 100; and as held in International Association of Machinists v. Gonzales, 356 U.S. p. 617, 78 Supreme Ct. 923, the Labor Management Relations Act does not displace state court jurisdiction over suits to determine and enforce rights of union members in their union. In the cited cases it is stated: "But the protection of union members in their rights as members from arbitrary conduct by unions and union

officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to §8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *'." The point is again overruled.

Appellants' further points should now be stated: Of court error; (2) because Lanham had no duty to refer Borden to the job site as requested; (3) because the denial by Lanham of a referral was not the cause for Borden's failure to obtain employment at the Bank site; (4) because the union was not responsible for Lanham's acts; (5) in admitting into evidence inflammatory, irrelevant and incompetent evidence; (6) because the finding of Thurman's authority to hire was contrary to the great weight and preponderance of the evidence; (7) in not barring the plaintiff's recovery because of his failure to exhaust remedies within the union; (8) in not finding that the plaintiff was barred from recovery by laches and/or estoppel; (9) in awarding punitive damages; (10) in not setting aside the verdict and declaring a mistrial because the jury's answer to Special Issue No. 5 contradicted and conflicted with the jury's answer to Special Issue No. 7. All of the above points were appropriately countered by appellee.

Local Union 100 is an unincorporated association of some 800 membership in 1954, plaintiff being a member of that union. Members of one Local of the parent association can transfer to any other Local if in good standing. A clearance

card is a devise by which a home local certifies that a member is in good standing. When this card is presented to a local under whose auspices the member seeks to work, the member is in all respects transferred to that Local. A member may also commence work in a certain locality by placing a deposit with the Local Union and later securing his clearance card.

A resume of material evidence bearing on all points and counterpoints (though generally disputed) is presented in the brief of appellee: that in mid-September 1953 Borden arrived in Dallas and called Jack Heath, superintendent of Farwell Construction Company. He had previously worked for this company in Galveston, being there told that he could work for said company on the Republic job site. On coming to Dallas Borden then presented his dues book to Lanham, business manager of Local Union 100; Lanham then telling him that he had come to Dallas "with a job in his pocket" and refused to accept Borden's dues book, further telling him that he would never go to work on the Bank Building and that the best thing for him to do was to get out of town. It was undisputed the uniform practice of Local Union 100 that in case a particular man was requested by a contractor, to send that man to work on that project—a practice, according to Galvin, successor to Lanham, that had been in effect during the eleven years of his connection with Local 100.

After this initial contact with Lanham, Borden returned to his home local at Shreveport, securing his clearance card and returning to Dallas, then seeking to present such card to Lanham. After several attempts, Borden found Lanham in a cafe across the street from the Union Hall and offered his

clearance card. On return to the union office Lanham accepted the clearance card but told Borden "that don't mean you are going to work by any means." In the meantime, according to A. G. Thurman, foreman of the Bank project, Borden had called him, stating that he was in town, desiring a job and had placed a clearance card with Local 100, Thurman saying "if you get a referral come on down" that he (Thurman) later called Lanham requesting that Borden be referred to the Bank project, to which Lanham replied "I am not about to send that old S-O-B down there. He shoved his card down our throats and I am not about to send him to the Bank."

Borden testified that continually thereafter he had requested employment on the Bank site but was continually denied work going on there from September 15, 1953 to September 15, 1954; and it is not disputed that plaintiff held himself available for work on the bank job during all that time; in the interval, being referred to several other jobs by Lanham; that he had complained to Zeufeldt, business agent of the Union, also to several other members of the discriminatory treatment here alleged; further that in October 1953 at a general membership meeting, his complaint was discussed in the executive minutes of the union which were then read; it being stated at that time and called to the attention of the union that Borden was not referred to the Bank site because "he came in here wrong" and would not be allowed to work there. There was further testimony that the executive minutes read at that meeting had been subpoenaed but reported lost while in possession of Zeufeldt, the business

agent. There was testimony of Borden's continued complaint concerning this discriminatory treatment, further evidenced by conversation with Galvin, the successor business manager, who after hearing Borden's story, did nothing about the existing situation; that thereafter in October 1954 an executive meeting of Local Union 100 was held to consider plaintiff's charges; that at such meeting the Executive Board had maligned Borden, telling him to quit complaining about the treatment he had received from the union, if not, they would expel him from the union and kick him out of Dallas; that the best thing he could do would be to "get out of Dallas". As a result of his appearance before the Executive Committee, Borden said that he was thereafter in fear of bodily harm at the hands of said Union.

It is rather difficult to follow appellants' argument that "Lanham had no duty to refer Borden to the job site requestion" in view of its established policy, that once a request is made by an employer for a specific employee, that person is immediately referred to the job site. That this was the uniform practice is explicit in the testimony of foreman Thurman; he stating that in obtaining employees he would place calls with Local 100 which is "the end of my obligation in getting a man on the job"; further testifying that all employees hired by him came through the union office; answering "No, [illegible] the question "Have you ever hired anyone on the job except through Union referral, as is the custom here"; and the record as hereinabove narrated, in our opinion constituted sufficient proof that respondent was wilfully denied a job opportunity to which

Lanham knew he was entitled to under the rules and procedures established by petitioners for allocating work among their members. Supreme Court 328 SW 2d 739.

With respect to point three, the referral of plaintiff to the Bank site for work at request of Thurman was in accordance with above union custom, refused by Lanham, with resulting injury to plaintiff. A direct solicitation of the job by him would have been in violation of union rules, Art. 1 § 30, providing: "Members shall not solicit work from any contractor or their representative. All employment must be procured through business office of Local Union 100. Violations of this Section subject to assessment of not less than Five Dollars ($5.00). * * * *."

Appellant argues the lack of evidence of any responsibility on part of the union for the acts of Lanham, the jury having found that with full knowledge of the conduct of Lanham, "the officers and membership of defendant Local 100 approved such conduct" (Issue 8). We think that record testimony already stated raise the issue. Zuefeldt, the business agent, also Galvin, successor to Lanham, testified to Borden's complaint of discrimination. B. C. Hall, had testified to attendance upon a business meeting of the union in October 1953 (the minutes of which were later lost) at which time Borden's case was discussed, it being stated that he "came in wrong and that plaintiff was not going to get the requested job because they (the union) weren't going to refer him to the job." Although no action was there taken by the membership, such inaction under the facts of this record must be held tantamount to approval

of the prior conduct of Lanham and a consequent ratification. Concerning silence or inaction as ratification, see Cameron v. Gibson, 278 SW 522 where the court quotes from 2 C.J.p. 504, 505 as follows: "Mere silence or delay on the part of a principal in repudiating the unauthorized act of an agent does not necessarily amount to a ratification, but while it is not necessarily conclusive evidence of a ratification, unless it cannot be explained on any other theory, it is always an element to be considered in connection with other evidence tending to show a ratification, and may alone be sufficient to justify a finding of ratification, particularly where the circumstances impose a special duty upon the principal to speak, as where the other party is liable to be misled or injured by his failure to do so." See also 2 C.J.S. § 57, p. 1126.

Excerpts of admitted testimony is quoted by appellant which is complained of as "inflammatory, irrelevant and incompetent." Such evidence relates principally to a prior practice of the local to refuse clearance cards to outside workmen; bearing, according to appellee, on knowledge by defendant of the discriminatory acts of Lanham. As such, they may be deemed relevant. Nor are the conversations had with Thurman, same being inclusive of the job offer to Borden excludable as hearsay. Thurman, the job foreman, was a member of said local, all members of which were adverse parties to plaintiff. In this connection, appellant says that the jury finding under issue one of the promise to plaintiff by Thurman, authorized foreman of the Farwell Construction Company, was contrary to the great

weight and preponderance of the evidence; and the testimony of Northington, general superintendent, is cited that "if anybody was hired I looked for one thing, that it was either Mr. Heath (plumbers) or Mr. George (steamfitters)." Here, while facts of the alleged agency may not be shown by declarations of the agent alone, such constitutes original evidence, and not objectionable as hearsay. Cook v. Hammer, (Sup.) 309 SW 2d 54. Thurman, plumber foreman, testified that workers on the Republic Bank job were hired by him, he calling Local 100 office and asked for men as needed, the union manager issuing a referral to the job site. Concerning authority to hire his own men, Thurman testified, to a conversation with Heath, plumbing superintendent, (now dead) as follows: "Q. Did you know Jack Heath? A. Yes, sir, very well. Q. What job did he have on that. A. He was general superintendent. Q. He did the hiring on the job, did he not. A. Not necessarily, he hired the foremans or set men up as foremans, but the foremans hired their own men as they sought fit." The testimony of Northington, general superintendent of Farwell, was in nowise contradictory to the above; his answers on cross-examination going no further than that he looked to George and Heath for satisfactory results. And issue one is not objectionable as multifarious and duplicitious. The fact of a job offer by Thurman to Borden is not disputed, the authority of the former to make such an offering being only at issue. Appellant could not have been injured by this combination of a disputed issue with the undisputed one. Goodrick v. First National Bank, writ ref., 70 SW 2d 609.

The jury found that though Borden failed to exhaust the remedies available to him through union channels, also that pursuit of remedies, rules and procedures of the union would have been useless. Appellant assets that plaintiff's claim is barred because of such failure, but the point is overruled. The Constitution and By-Laws of both parent association and defendant Local deal strictly with assessments, suspensions and expulsion, no where providing for a procedure whereby an allegedly wronged member may make claim for back wages or damages for discriminatory practices as in the instant situation and the testimony was clear that any application of union sanctions would have resulted only in the punishment of Lanham. Clearly, therefor, the pursuit of any remedies against the union by Borden would have been ineffectual, illusory and futile as well. In Anderson, et al. v. Painters' Local Union No. 318, 338 SW 2d 148 is stated the general rule as set forth in 168 ALR, pages 1472-1473 that: "* * * * it is pretty generally held that where exhaustion of remedies within the Union would amount to a practical denial of justice to the expelled or suspended member, or would be illusory or vain, it will not be insisted upon, particularly where property rights of the members are involved, as a condition to the right to invoke the aid of a court of equity for reinstatement to and restoration of membership." (emphasis ours).

Appellant contends that the suit should be barred by laches or estoppel. The material facts relative to this point have heretofore been sufficiently detailed. The action was brought approximately a year after it became clear to

plaintiff that he could proceed no further within the frame work of the union (except for the vain and illusory appeal just discussed) and no laches is shown, defined in 27 Tex. Jur. p. 16, as "inexcusable delay in asserting an equitable claim." Nor is equitable estoppel involved; an element of which is "the effect of the *voluntary* conduct of a party whereby he is absolutely precluded, both in law and in equity, from asserting the right that might perhaps otherwise have existed * * *." (emphasis ours). (22 Tex. Jur. 2d p. 664). Under the restrictive provisions of defendant's Local's By-Laws and Constitution, plaintiff had no alternative other than to work at other job sites on referrals by the union. Through economic compulsion plaintiff was required to accept these referrals and his action cannot be said to be voluntary within meaning of this equitable doctrine. There was no detrimental reliance thereon, or change of position by the union; and appellee though referred to other jobs did not abandon his quest for employment on the Bank site.

Appellant charges an absolute lack of evidence on which to base any punitive damages or of knowledge by the membership of the wilful nature of Lanham's conduct. The latter phase of such point has already been touched upon; as also the sufficiency of evidence in support of the jury's answer (Issue 8) that "the officers and members of said defendant Local Union approved such conduct." The term "wilfully" was properly defined and it is well settled that when the conduct is shown to be wilful, punitive damages are recoverable. Briggs v. Rodriguez, 236 SW 2d 510.

Lastly appellant says that the jury answers to issues 5 and 7 are contradictory and irreconcilable, and that because of such conflict a mistrial should have been declared. The jury answered "yes" to Issue 5 reading: "Do you find from a preponderance of the evidence that the said defendant Local Union 100, acting by and through Cleo Lanham, wilfully refused to let the plaintiff work on said Republic National Bank Building?" Issue 7, to which the jury answered "No" reads: "Do you find from a preponderance of the evidence that such refusal to let the plaintiff work on said Republic National Bank Building, if you have so found, was without any cause or reason whatsoever?" During its consideration of the latter issue the jury questioned the trial Judge as follows: "Does 'without any cause or reason' mean without any reason whatsoever (personal or otherwise) or does it mean with reason according to the union by-laws?" to which the court replied: "In answer to such communication you are instructed that: 'It means a cause or reason' which was actuated by an intent that was not in good faith. A denial, even though erroneous, which resulted merely from negligence, inadvertence or mistake would not be without any cause or reason whatsoever."

In due course appellee made motion to disregard the jury's answer to issue 7 as not ultimate or controlling and for judgment on the remaining answers which the courts granted and so found in final judgment.

Appellant now argues that "Findings 5 and 7, considered separately and taken as true, would compel different judgments. The Supreme Court, in its earlier decision in this

matter, stated that the union was not liable if Lanham's action, although wrongful, resulted from negligence, inadvertence or mistake. By Special Issue No. 7 the jury so found, and it follows that the union is not liable. On the other hand, the Supreme Court stated that if Lanham wilfully denied Borden a job opportunity, and other named conditions were present as well, the union was liable." We do not pause to interpret the effect of jury answer to Issue No. 7 aided (if it was) by the Court's extraneous instruction thereon in answer to their inquiry.

In the first place, Issue 7 was eliminated by the court in final judgment, its rendition being for plaintiff on the remaining jury findings. There could be no basis therefore for claim of irreconcilable conflict of issues; and while appellant took exception to the court's action in so disregarding issue No. 7 and answer, same was not brought forward in any point on appeal. Furthermore, the issue was evidentiary at best. In deciding whether these findings are in direct and irreconcilable conflict, the entire charge and all of the verdict must be considered. 41 Tex. Jur. p. 794, and we must not presume that the jury intended to render conflicting answers. Swift & Co. v. Phillips, 314 SW 2d 326. In Issue No. 5 the jury had already found that the conduct of Cleo Lanham was wilful; the term meaning, under the court's charge, "the intentional and purposeful disregard of the known rights of another". And any "cause or reason" for Lanham's refusal to refer plaintiff to the job site is explicit in the testimony of the latter, also Thurman's, already sufficiently detailed. The point is accordingly overruled.

Appellee's crosspoint No. 1 the jury had made an award to plaintiff of $5,000 as punitive damages which the trial court found to be "unjust and excessive under the facts and that the plaintiff should be required to remit to the extent of such punitive damages not to exceed the actual damages awarded * * * *." By subtraction, (Issues 9 & 10) the punitive damages awarded was reduced to $1,916. Appellee in turn asserts error in this requirement of remittitur of $3,084; pointing out that the jury verdict is not excessive under the test laid down in 13 Tex. Jur. p. 396, and followed by the adjudicated cases. However, in the recent case of Flanigan v. Carswell, 324 SW 2d 835 our Supreme Court held that a Court of Civil Appeals in passing upon a trial court's action in ordering a remittitur must determine propriety of the order by deciding whether such trial court has abused its discretion.

In the light of all the facts and circumstances of this cause, we cannot say that the action of Judge Stout in this connection was manifestly unjust and hence overrule the crosspoint.

All points of appeal are accordingly overruled and judgment of the trial court is in all respects affirmed.

YOUNG, Associate Justice.

DELIVERED:
FEBRUARY 9, 1962.

FOOTNOTE:

The same jurisdictional plea had been previously raised on appeal to this Court (315 SW 2d 458) and overruled but not interposed on writ of error to the Supreme Court of Texas. See 328 SW 2d 739.

Opinion of the Supreme Court of Texas
Delivered November 4, 1959

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA ET AL,

Petitioners,

v.

H. N. BORDEN,

Respondent.

From Dallas County
Fifth District

On the principal question in this case, we hold that a member of an unincorporated association can maintain an action against the latter for damages caused by an intentional wrong knowingly committed by one of its agents, provided the association participates in or otherwise authorizes or ratifies the wrongful conduct. The suit is an action for damages brought by H. N. Borden, respondent, against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry and its Local Union 100, petitioners. Each petitioner is an unincorporated labor union. The trial court sustained Petitioners' pleas in abatement and dismissed the suit on two grounds, holding: (1) that respondent, as a member of the two labor organizations, has

no standing to maintain this suit against them for money damages; and (2) that the matters of which the respondent complains are within the exclusive jurisdiction of the National Labor Relations Board. Having concluded that neither of these contentions is sound, the Court of Civil Appeals reversed the judgment of the trial court and remanded the cause for trial. 316 S. W. 2d 458.

The holding of the Court of Civil Appeals that respondent's complaint does not lie within the exclusive jurisdiction of the National Labor Relations Board is not challenged here, and it is unnecessary for us to consider that question. We are confronted at the outset, however, by petitioners' contention that respondent did not perfect his appeal by timely filing an appeal bond. Within thirty days after the entry of final judgment in the district court, respondent filed a bond conditioned that he would pay all costs that might be adjudged against him in the suit. It did not specify the judgment from which he wished to appeal, and was not conditioned that his appeal would be prosecuted with effect.

Petitioners moved the Court of Civil Appeals to dismiss the appeal, and respondent thereupon requested and was granted leave to amend the bond. A proper appeal bond was then filed promptly, but this was after the expiration of the thirty-day period allowed by Rule 356, T.R.C.P. Petitioners argue that the original bond was in no sense an appeal bond and therefore could not be amended. We do not agree. Rule 430, T.R.C.P., provides that when there is a defect of substance or form in any appeal bond, then on motion to dismiss for such defect, the appellate court may allow the same to be

amended by filing a new bond. This authorizes the amendment of any sort of instrument which can be said to be a bond and which was filed for the purpose of taking an appeal. See Grogan Mfg. Co. v. Lane, 140 Tex. 507, 169 S. W. 2d 141. Although the original bond does not show on its face that it was intended to serve as an appeal bond, there is other evidence in the record which supports an implied finding by the Court of Civil Appeals that the same was filed in a bona fide attempt to invoke appellate court jurisdiction. We presume such a finding in support of its action, and hold that the intermediate court did not err in permitting the bond to be amended.

Turning now to the merits of the appeal, respondent alleged that he is now a member of the two labor organizations. While a member of the United Association's local union in Galveston, he was promised a job by Farwell Construction Company on the construction of the Republic National Bank Building in Dallas. After obtaining a clearance card from the Galveston local stating that he was in good standing and should be admitted to any other local union of the United Association, he went to the headquarters of Local Union 100 in Dallas for the purpose of being accepted into membership in order that he might take the job which had been promised him. In the meantime, Farwell Construction Company had placed a call with Cleo Lanham, agent and business manager of Local Union 100, for respondent to go to work on the bank building. Lanham at first refused to accept respondent's clearance card. Several days later, the card was accepted, but at the same time respondent was cursed and abused by Lan-

ham and informed that as long as the latter had power, he would in his capacity as agent and business manager see to it that respondent was never allowed to work on the bank. Although respondent thereafter submitted his complaint to the petitioners at a meeting, he was offered no remedy and was told that if he continued to complain he would be discharged from the union altogether.

It was further alleged that the petitioners, with actual knowledge of the acts of their agent and business manager, had acquiesced in and ratified same by their subsequent conduct in that respondent was never offered a remedy or allowed to work on the bank building; that petitioners have, without any cause or reason whatsoever, wilfully and discriminatorily refused to allow respondent to do such work; and that the wilful, malicious and discriminatory acts of the petitioners constitute a conspiracy and a wrongful interference with respondent's right to contract and work. There are also allegations of the amount which respondent would have earned on the bank job, and of his actual earnings in other employment he was able to find, and a prayer for actual and exemplary damages.

Petitioners contend and the trial court held that this case is governed by the general rule that an unincorporated association is not liable to one of its members for damages occasioned by the wrongful act of another member or agent of the association. The reason for such immunity is that the injured member and the association are regarded as coprincipals and the tort-feasor as their common agent. The wrongful conduct is thus imputable to the plaintiff for purposes of

his action against the association. See Annotation, 14 A.L.R. 2d 473. Typical of the cases in which these principles have been correctly applied are De Villars v. Hessler, 363 Pa. 498, 70 A. 2d 333, 14 A.L.R. 2d 470, where the plaintiff was injured as a result of the negligent operation of a steam table maintained by the defendant association at a county fair, and Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587, which holds that an unincorporated labor organization is not liable for injuries received by a member who tripped over a platform negligently placed by the officers of the union in a hall rented for a union meeting. In each instance the negligence occurred in the course of an undertaking which was for the benefit of all members of the organization, including the plaintiff, and under these circumstances it was entirely proper to impute the wrongful conduct to the latter.

It cannot be said, however, that a labor organization or other unincorporated association is never liable to a member for the wrongful conduct of one of its agents. Since the association's immunity rests upon the premise that the tortfeasor also acts as agent for the injured member, the rights and liabilities of the parties necessarily depend upon the relationship existing at the time the wrongful act is committed. For example, where the relation of principal and agent is deemed to exist between the plaintiff and the association's representative when the wrong was done, the former could not acquire a cause of action against the organization by simply terminating his membership. If anyone acting for the association is always to be regarded in law as agent for all of its members in whatever he may do, it would seem to

follow that a member could not even recover damages for wrongful expulsion. In such a case the plaintiff might not be a member at the time of suit, but this would not alter the fact that the association's representative was acting as his agent in expelling him from membership.

It is well settled, however, that a member does have a cause of action for damages against his union for wrongful expulsion. See International Printing Pressmen and Assistants' Union of North America v. Smith, 145 Tex. 399, 198 S. W. 2d 729; International Association of Machinists v. Gonzales, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018. The question now under consideration is not discussed in these cases, but the reasons for holding that the union representative does not act as agent for a member who is wrongfully expelled are well expressed in Bonsor v. Musicians' Union, (Eng.) 3 W.L.R. 788, 3 All E.R. 518, as follows:

> "For the purposes of this appeal I am prepared to accept that proposition (i.e. the general theory that the agent is the agent of each member of the association) without inquiry as to what, if any, are the limits to be put on it. *But one of its essential ingredients is that the act complained of should be done by the agent on behalf of the injured member.* Was the Court of Appeal right in holding that the committee which expelled Mr. Kelly was, in so doing, acting as his agent? * * * *To say that this is done on behalf of the person expelled seems to me to be an unwarranted extension of the agency and quite out of keeping with reality.*"

There is thus at least one exception to the general rule that a union representative is to be regarded as an agent for all of its members in everything he does. The wrongful act will not

be imputed to an injured member if committed in the course of an undertaking that is strictly adverse to the latter's interests. This is simply another version of the agency rule that a principal is not liable for the torts committed by his agent while acting adversely to him. See C.J.S. Agency, § 259; Mechem on Agency, 2d ed. 1914 Vol. 2, p. 1311, § 1728.

The same idea is expressed in Taxicab Drivers' Local Union No. 889 v. Pittman, (Okla.), 322 P. 2d 153, which is similar in some respects to the present case. There the plaintiff had signed a petition to the international union making certain accusations against the officers and business manager of the local union. The international union made an investigation but took no action against the officers of the local union. Charges were thereafter filed against the plaintiff alleging that he had violated the provisions of the union constitution making it an offense to abuse fellow members. After a hearing which the court held was so unfair as to constitute no trial at all, the plaintiff was found guilty and sentenced to pay a fine and suspended from union activities for one year. Apparently he was not expelled from the union. On the next dues-paying date, the plaintiff tendered his dues but refused to pay the fine, and the union secretary declined to accept the dues unless the fine was also paid. Later the plaintiff was suspended from work by his employer at the request of the union pursuant to the provisions of a working agreement which required that all employees be in good standing with the local union. In the trial court the plaintiff was awarded recovery of actual and exemplary damages

against both the local and the international union. The judgment against the latter was reversed on appeal because of defective service of process, but the recovery against the local union was upheld. In disposing of the contention that the union could not be subjected to liability for the acts of its agents because the plaintiff-member was equally responsible for the wrongful conduct, the court said:

> "We note, however, that in each of those cases [holding that a labor union or other unincorporated association is not liable to a member for damage caused by the association's agent] the conduct of the agent was in the performance of his duty on behalf of the association in some project for which the plaintiff could reasonably expect to benefit just as much as any other member, at the inception of the project. * * * Common sense leads inexorably to the conclusion that officers of the Union causing plaintiff to be suspended from work without pay are anything but his agents for that purpose. The contrary conclusion would smack of flagellantism, an unlikely theory upon which to determine legal liabilities. The use of the agency doctrine under these specific circumstances has no support either in reason or public policy."

The contrary conclusion is not required by the decision in Brotherhood of Railroad Trainmen v. Allen, Tex. Civ. App., 230 S. W. 2d 325 (wr. ref.). In that case the union and the railroad had made a contract in settlement of claims for work which the latter had caused to be done by road crews instead of yard crews as required by the working agreement. By the terms of the settlement, the railroad was to pay a yard day to any available yard crew that would have been called to perform the work. Two members of the union then checked the records and advised the railroad which employees

were entitled to receive the money, and the funds were distributed among those so designated, about one-third being paid to extra men and two-thirds to regular men. Each of the plaintiffs was an extra man and was paid part of the award. They later brought suit against the railroad and the union, contending that they should have received practically all of the money that went to the regular men.

The plaintiffs there alleged that the actions of the railroad and the union were fraudulent in that they wilfully and knowingly contrived to benefit one group of employees at the expense of another group and that the collaboration of such defendants was a conspiracy against plaintiffs' rights, but the verdict does not support either of these theories. The railroad was dismissed prior to the trial, and no conspiracy issue was submitted. While the jury found, among other things, that the action of the union in designating others to receive the money was a fraud on the plaintiffs, the term "fraud" was defined as "an act, omission or concealment, which involves a breach of a legal duty, trust or confidence, justly imposed, and is injurious to another, or by which an undue and unconscientious advantage is taken of another * * *." The element of wrongful motive or intent was not included in the definition, and the answer to Special Issue No. 12 was simply a finding of legal or constructive fraud.

The union representatives in the Allen case undoubtedly were acting for the plaintiffs' benefit in making the settlement and in checking the records to ascertain how the money should be distributed. As a result of these activities, the plaintiffs were designated to and did receive part of the

funds. Any idea that the agents consciously worked against the plaintiffs' interest is effectively dispelled by the jury's determination that the distribution of the money was proximately caused by the negligent failure to check all available records. As the controversy reached the appellate court, therefore, it was simply a case of legal, but not wilful, fraud and discrimination resulting from negligence in performing services for the benefit of the plaintiffs and other union members. It was proper under these circumstances to impute the wrongful conduct to the plaintiffs and hold that they could not recover from the union for the dereliction of the joint agents.

The legal responsibility of an unincorporated association for the wrongful conduct of its agents should not be substantially different from that of an ordinary principal. The general rule is one principal is not civilly liable to another for the tortious acts of an agent who acts for both parties with their consent. He is responsible, however, where there is collusion with the agent, active participation in the wrongful act, or the same is otherwise authorized or ratified. See Ringer v. Wilkin, 32 Idaho 330, 183 P. 986; Boss v. Tomaras, 251 Mich. 469, 232 N. W. 229; Fuchs v. Leahy, 321 Mo. 47, 9 S. W. 2d 897; 3 C.J.S. Agency § 260. This was recognized in Blair v. Baird, Tex. Civ. App., 94 S. W. 116 (wm. dis.), where the court pointed out that "by the terms of the contract, O'Neal was the joint agent of the parties, and unless it had been shown that he had conspired with appellant Blair to defraud appellees, appellants would not be responsible for any misconduct on the part of O'Neal."

The present controversy has not been tried on the merits, and we do not know what the evidence will disclose. According to the petition, it was Lanham's duty to place the members of the union with their various job opportunitites. As long as he attempted in good faith to discharge that responsibility in a proper manner, his activities were calculated to benefit the respondent as much as any other member. If it appears that the denial to respondent of an opportunity to work on the Republic Bank Building, even though wrongful, resulted merely from negligence, inadvertence or mistake on the part of Lanham while trying to perform his duties fairly and impartially, petitioners are not legally responsible for respondent's damages. Brotherhood of Railroad Trainmen v. Allen, supra.

Under the pleadings, however, respondent is not confined to proof of negligence, inadvertence or mistake. He alleges that upon his arrival in Dallas, Lanham at first refused to accept his card; that when the card was later accepted, he was cursed and abused by Lanham and informed that the latter would see to it that he was never allowed to work on the bank job; that he was threatened with expulsion from the union if he continued to complain of this treatment; and that the acts of the defendants were willful and malicious and constitute a conspiracy. These allegations will support proof that respondent was willfully denied a job opportunity to which Lanham knew he was entitled under the rules and procedures established by petitioners for allocating work among their members, and that petitioners either conspired with Lanham to bring this about or otherwise authorized

or ratified his wrongful conduct. If these are the facts, we think the case represents another exception to the general rule mentioned above, and that respondent is entitled to maintain this suit against petitioners. It would be quite incongruous to say that the business manager was acting as agent for respondent in knowingly depriving him of all rights and privileges of union membership in so far as the Republic National Bank job is concerned.

We agree with the Court of Civil Appeals that the suit should not have been dismissed on the pleadings in their present form, and its judgment is affirmed.

Robert W. Hamilton
Associate Justice

RWH/p

Concurring opinion by Associate Justice Smith
Associate Justice Greenhill dissenting.

Opinion delivered:

November 4, 1959

In the Supreme Court of Texas

No. A-7058

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, ET AL.,

Petitioners,

v.

H. N. BORDEN,

Respondent.

From Dallas County
Fifth District

DISSENTING OPINION

I respectfully dissent. This is not a suit against the business agent who mistreated Borden. In my opinion, the legal principles here involved as to the Union are controlled by *Brotherhood of Railway Trainmen v. Allen* (1950), 230 S. W. 2d 325, writ refused, and *Atkinson v. Thompson*

(1958), 311 S. W. 2d 250, writ refused N.R.E., which follows the *Allen* case.

Joe Greenhill
Associate Justice

Opinion delivered
November 4, 1959

In the Supreme Court of Texas

No. A-7658

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA ET AL,

Petitioners,

v.

H. N. BORDEN,

Respondent.

From Dallas County, Fifth District.

CONCURRING OPINION

In concurring with the majority opinion, I feel constrained to set down my views relative to the improper action of the trial court in sustaining petitioners' plea in abatement and dismissing respondent's cause of action. The writ in the present case was granted because of the tentative view that the case of Brotherhood of Railroad Traimen v. Allen, Tex. Civ. App., 230 S.W. 2d 325, wr. ref. cert. den. 340 U.S. 934, 71 S. Ct. 501, rehearing denied 341 U.S. 906, 71 S. Ct. 611, was controlling and required a dismissal of Borden's suit. I do not agree with petitioners that the Allen case is controlling. However, since the writ has been granted, and since

the petitioners are entitled to a full analysis of the cases upon which they rely, as well as our reasons for declining to follow such cases, I respectfully file the following opinion.

The facts, as peaded, show that the agent of the Union in perpetrating the alleged wrongful acts was not in fact acting for Borden, although Borden alleged that he was and still was at the time of filing the suit a member of Labor Union 100. Borden alleged that on the 15th day of September 1953, he was promised a *job opportunity* on the construction of the Republic National Bank Building at Dallas, Dallas County, Texas, by Farwell Construction Company. Borden alleged that prior to such job offering, he was a member of labor union's local in Galveston, Texas; that he secured a clearance card from the Galveston union stating that he was in good standing and should be admitted to any other local union, but, that upon arrival in Dallas in September 1953, the Local Union 100, by and through its agent and business manager, Cleo Lanham, whose duty it was to accept Borden, refused to accept such clearance card; that Lanham so refused even though A. G. Thurman, a duty authorized representative of Farwell, had, by long distance telephone, given instructions that Borden had been employed and request was made that he be allowed to work; that on October 9, 1953 the labor unions finally accepted the clearance card, but at the same time Lanham, while acting in his official capacity, cursed and abused him, and thereafter did state and inform Borden "that as far as he, the said Lanham, had control and as long as he had any such power, he would in his capacity as Agent and Business Manager of the Union see to

it that this plaintiff would never be allowed to work on the *job opportunity* promised to him by Farwell Construction Company." The petition further alleges in substance that the labor unions acquiesced in and ratified such conduct, and that all of such actions and conduct on the part of labor unions and said agent amounted to a conspiracy, and constituted an interference with Borden's right to contract and his inherent right to work. Borden also alleged that he had a contract with both labor unions, and implied in such contract as a promise by the labor unions not to discriminate unfairly or unjustly or to deny a member a right to work, and that the acts complained of constituted a breach of such implied contract.

Borden's prayer was for damages in the total sum of $19,039.50. The sums of $5,000.00 for mental anguish, $4,039.50 as damages for loss of earnings, and $10,000.00 as punitive damages make up the total.

Borden's pleadings indicate a total loss of earnings on the Republic Bank job would have been $7,097.00. However, in mitigation of his damages, he pleaded that "as a result of being denied the job opportunity on the Republic National Bank Building, the plaintiff did attempt to find other work and did so find other wirk (sic) to-wit: Kiefer Plumbing Company, from which the plaintiff earned $1229.60; Rose Brothers Plumbing Company, from which the plaintiff earned $840.60; Spencer Brothers Plumbing Company, from which the plaintiff earned $997.30, but that the total of the amount earned during this period was $4,039.50 less than he would have earned had he been allowed to work on the Re-

public National Bank Building in Dallas, Dallas County, Texas, during the same period, to-wit: September 15, 1953, to September 15, 1954."

The labor unions filed separate pleas in abatement. The trial court sustained both pleas. The parent body, United Association, limited its plea to the claim that Borden had no standing to sue it for the reason "that a member of an unincorporated Association may not sue said Association for *dereliction of duty upon the part of agents of such* Association, but rather the member must sue the agents as individuals."

Local Union 100 limited its plea in abatement to the contention that the matters of which "plaintiff complains" are matters within the exclusive jurisdiction of the National Labor Relations Board pursuant to the Federal Labor Management Relations Act of 1947 (Taft-Hartley), which statute provides in pertinent part that it is an unfair labor practice for a labor organization or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157; PROVIDED, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *." Labor union's pleading continues: "The cited Federal legislation preempts the field and deprives this Honorable Court of the State of Texas of jurisdiction to hear and determine the matters alleged in plaintiff's petition for the reason that exclusive jurisdiction

of said matters are by federal statute, lodged in the federal administrative agency and the federal court, and plaintiff has wholly failed to seek, utilize, or exhaust remedies available before the federal agency and federal court under the federal law."

No evidence was introduced at the hearing on the pleas in abatement which began on November 30, 1956, and ended on February 15, 1957, when the trial court entered its judgment and order sustaining both pleas in abatement, reciting in the order "* * * and it appearing to the court that plaintiff is a member of defendant labor organizations and thus has no standing to sue said organizations for money damages; and it further appearing that jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction."

On appeal, the Court of Civil Appeals reversed both holdings of the trial court, and remanded the cause for trial. 316 S.W. 2d 458.

The jurisdictional question, supra, is not before this Court. The two points presented here are: (1) that a member of a voluntary unincorporated union has no right to recover money damages from the association of which he is a member for the dereliction of duty of the joint agent of the association members; (2) that the Court of Civil Appeals lacked jurisdiction by reason of Gorden's failure to perfect his appeal by timely filing an appeal bond.

I dispose of the questions in reverse order. The bond filed within the 30-day period provided by Rule 356, Texas Rules of Civil Procedure, even though defective, conferred jurisdiction, and since the Court of Civil Appeals granted permission and Borden filed an amended bond, that court had jurisdiction of the appeal. See Rule 430, T.R.C.P.; Pillow v. McLean, 126 Tex. 349, 88 S.W. 2d 702 (1935); Williams v. Wiley, 96 Tex. 148, 71 S.W. 12 (1902); Grogan Manufacturing Company v. Lane, 140 Tex. 507, 169 S.W. 2d 141 (1943); Lusher v. First National Bank of Fort Worth, Tex. Civ. App., 260 S.W. 2d 621 (1953), er. ref. n.r.e.

This brings me to the first point. I have heretofore pointed out that the labor unions contend that the question is controlled by the rule announced in the case of Brotherhood of Railroad Trainmen v. Allen, supra.

In order to be certain as to the pleadings, facts, and issues involved in the Allen case, the Clerk of this Court secured from the Clerk of the Court of Civil Appeals at Waco, Texas, the original record in that case. The transcript reveals that the case originally began as a suit against the Texas and New Orleans Railroad Company and the Brotherhood of Railroad Trainmen charging a conspiracy between the railroad and the Brotherhood, and further charging fraud. The pleadings in the alternative charged negligence in certain particulars on the part of the Brotherhood alone. At the close of the evidence, the railroad was dismissed from the case and the issue of fraud thereby went out of the case. Thereupon, 14 special issues were submitted to the jury. Thirteen of these issues were concerned with certain acts of alleged negli-

gence and discrimination on the part of the Brotherhood. The Brotherhood was found guilty of several acts of negligence, and the jury found that each act was a proximate cause, etc. Special Issue No. 12 was conditionally submitted upon a "yes" answer to either Special Issue 1a or 1c. Those issues read as follows:

> "Special Issue 1a: Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, through its representative or representatives, designated persons other than available yard crews that would have been called to perform the work to receive payment under the awards involved herein?" Answer "Yes" or "No." Answer "Yes."
>
> "Special Issue No. 1c: Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, through its representative or representatives, agreed to the designation of persons other than available yard crews that would have been called to perform the work to receive payment under the awards involved herein?" Answer "Yes" or "No." Answer "Yes."

Special Issue No. 12 reads:

> "Do you find from a preponderance of the evidence that the Brotherhood of Railroad Trainmen, in so designating or agreeing to such designation, if you have so found, (Special Issues 1a to 1c), practiced a fraud upon plaintiffs, or either or them?" Answer "Yes."

It is necessary to state the factual background, as reflected in the statement of facts in the record of the Allen case. After the dismissal of the issues of fraud, the Court was only concerned with the following pertinent facts bearing on negligence. Certain employees, (yard men) of the railroad, who were also members of a Railroad Brother-

hood, charged that the Brotherhood had negligently paid certain sums of money to the regular railroad crew in violation of the contract between plaintiff-employees and the Brotherhood. It was claimed that certain services within the Dallas yard, such as "picking up" cars, "setting out" cars, handling road engines, and turning engines and trains, under the contract between plaintiff-employees and the Brotherhood, were to be performed by the yard men and not the road crew. The plaintiff-employees alleged that the Brotherhood, a voluntary association, was, and had been for many years, the collective bargaining agent of the yard employees (plaintiffs), and under the terms of its membership contract with plaintiffs was obligated to represent them without discrimination in all disputes with the railroad. The plaintiffs' charge that the Brotherhood acted discriminatorily is found in the allegation that the Brotherhood, in distributing the funds involved, caused "some employees to get larger shares of the $60,616.20 than they were entitled to and caused plaintiffs to get far less than the amounts to which they were entitled and therefore the Brotherhood wrongfully deprived plaintiffs of the sums of which they were entitled." Plaintiffs sought judgment against the Brotherhood for all sums due under the contract dated March 1, 1946, between the Railroad and the Brotherhood (acting for plaintiffs-yard men). The railroad was dismissed from the suit. The Court of Civil Appeals in its opinion in the Allen case states that A. L. Weiss and Doyle Andrews were the agents and representatives of plaintiffs as well as all other members of the Union; that Weiss

selected Andrews to check the records; that Anderws did check the records; Weiss was present part of the time. After the check was made certain members were designated and certified to the railroad as being entitled to receive the funds; that the plaintiffs, as appellees, were contending that had all of the available records been checked, it would have been ascertained that the extra men and not the road crew would have been entitled to receive most if not all of the money paid by the railroad under the awards.

Although the fraud issue was submitted, it is clear that when the case reached the Court of Civil Appeals for decision and when that court finally rendered its judgment, the dismissal of the railroad company from the suit effectively eliminated all issues of conspiracy and fraud and the Court of Civil Appeals decided only the narrow question relative to the charged acts of negligence on the part of the agents of the Brotherhood.

The Brotherhood's points, which were the only points considered and sustained in the Allen case were as follows:

"*Point Ten*

"Since the plaintiffs are members in good standing of the Brotherhood, which is a fraternal benefit association and labor union bargaining for the craft in the employment in which plaintiffs were engaged, plaintiffs cannot sue the Brotherhood for the acts of any Brotherhood agent, even though said acts were negligence, since the agents of the Brotherhood, being also members of the Brotherhood, are agents of the plaintiffs and each of them, and the Brotherhood is not liable to any member for the negligent acts of another member thereof."

"Point Eleven

"Each of the plaintiffs being a member in good standing of the Brotherhood, which is an unincorporated fraternal benefit association, as well as labor union, cannot sue the Brotherhood for the negligence of a brother member alleging that said member was a negligent agent of the Brotherhood, and since the agent is also the agent of the plaintiffs, even though the agent's act was negligent, if any one was liable to plaintiffs, it would be the agent and not the Brotherhood. Therefore the trial court erred in submitting issues of negligence of the Brotherhood to the jury and in failing to sustain defendant's motions for instructed verdict and defendant's motion for judgment non obstante veredicto."

This being the state of the record, the Court of Civil Appeals held, in effect, that the agents, Weiss and Andrews, were joint agents of plaintiffs and the Unions and all other members of the Union, and that under such circumstances, the plaintiffs had no cause of action against their coprincipals for the dereliction of common agents, citing Hromek v. Gemeinde (1941) 238 Wis. 204, 298 N.W. 587, and other cases. In the Hromek case, supra, it was held that no liability on the part of an unincorporated labor union existed in favor of a member who in a hall rented by the Union for purposes of its meeting, tripped over a platform negligently placed in the room by the officers of the Union and received injuries. The Court rested its decision on the ground that the officers of the Union were not only acting for the Union and all the other members but also for the plaintiff, and that plaintiff could not sue her coprincipals for the dereliction of a common agent. See 15 A.L.R. 2d 475.

In the case of Koogler et al v. Koogler, (1933) 127 Ohio St. 57, 186 N.E. 725, another case cited by the Court in the Allen case, the trustees of an unincorporated beneficial association were held not liable in damages to a member of the association for personal injuries sustained by him as a result of the failing of a fire-escape ladder on the sidewalk by the breaking of its suspending cable when he was walking on the sidewalk preliminary to replacing a glass on a broken window for the association. The ground of the decision was that since members of an unincorporated beneficial association are joint enterprisers, the tort of the association is the tort of all the members, including the plaintiff himself, and the plaintiff cannot sue himself for a tort committed by himself. The Court, however, in this latter case where the right of a member of an unincorporated association for injuries as the result of the negligence of the association was involved, distinguished such case from those cited by the plaintiff on the ground that in some of the cited cases the defendant was a corporate entity, in others a contractual relation was involved, in others the party suing had not as yet become a member, in others actions for expulsion was involved, and in still others the party suing had ceased to be a member. In this case, as well as in the Allen case, the Court, in distinguishing the cases, recognized the right of a member of a voluntary association to be protected in the enjoyment of membership against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which this enjoyment of such right would be impaired or destroyed.

The application for writ of error in the Allen case was refused. The Brotherhood stated in its reply to the application for writ of error that "neither seniority rights, expulsion, nor the rights of members to work and earn a living are questioned in this case." The effect of this argument is to, in a measure, admit that if expulsion or the right to work and make a living had been involved, the plaintiffs' contention would have been correct. The Allen case stands for the proposition and its effect should be limited to instances where the union member bringing the action is equally responsible for the dereliction of the union representatives. The Allen case was fully developed and a complete trial of the issues was allowed, whereas, our Borden case went off on a plea in abatement. Borden has never had his day in court. The Brotherhood in the Allen case was in a position to discuss the constitution and bylaws of the association. Such instruments were introduced in evidence. Not so here. They were able to show that the members were seeking to invoke the rights of the Brotherhood to be free from destructive suits where no cause of action really existed.

The other Texas case relied upon by petitioners is that of Atkinson v. Thompson, Tex. Civ. App., 311 S.W. 2d 250 (1958), er. ref. n.r.e. July 9, 1958. The Court of Civil Appeals, in holding that the plea in abatement was properly sustained, cited the Allen case in support of such holding. The pleadings and the facts were different than those finally passed upon in the Allen case. Atkinson pleaded, in the alternative, that the "Brotherhood actually instigated his discharge and said denial of his rights of seniority, and con-

spired with Guy A. Thompson, Trustee, to deprive him of his rights or seniority, all to his damage in the amount of $7,000."

The railroad and the Brotherhood each filed a plea in abatement. The trial court sustained such pleas and the Court of Civil Appeals affirmed. The opinion of the Court of Civil Appeals contains language which may be interpreted as supporting the petitioners' position in the present case. The opinion, to the extent that it expresses holdings contrary to the holding by the majority and in this concurring opinion, should be expressly overruled. This should be done even though refusal of the writ, n.r.e. could be justified because of failure of the petitioners to properly preserve the point in this Court. Atkinson's pleadings of conspiracy and fraud, and the nature of the two pleas in abatement are set out in the opinion. The Court of Civil Appeals made its holding that "the real reason appellant cannot sue for the wrongful act of the agent of the Brotherhood is that as a member of the Brotherhood he is jointly responsible with all other members for the actions of the group itself, and accordingly as a principal he has no cause of action against coprincipals for the wrongful conduct of a common agent," in the light of Atkinson's pleadings. The court, in construing the Allen case, states that the railroad was dismissed, but it gives no effect to the fact that the dismissal also eliminated all issues as to wrongful participation in or ratification of the intentional wrong knowingly committed by one of the agents of the Brotherhood. For the reasons stated, I would not overrule the Allen case, but would overrule the Atkinson case.

The petitioners also rely upon the case of Marchitto v. Central Ry. Co. of N.J., 88 A. 851. It is clear from the opinion that in answering the question: "Did the complaint state a cause of action against the defendants," the Supreme Court of New Jersey, speaking through Chief Justice Vanderbilt, confined its holding to the issues, as made by the pleadings, between the plaintiff on the one hand and the Brotherhood and its agent, Giles, on the other. The court held no cause of action had been stated against the Brotherhood, but that as against Giles, the pleadings stated a cause of action. The cause of action against the railroad was ordered stricken by the trial court. Subsequent to this action, the trial court sustained the contention of the Brotherhood and Giles that the complaint (plaintiff's pleadings) failed to state a cause of action. It appears from the opinion that the court simply held that the Brotherhood was an unincorporated fraternal association; that it was not a separate legal entity and had no existence apart from that of its individual members; that in legal effect the plaintiff and every other member of the Brotherhood are co-principals joined together in a joint enterprise to accomplish a common purpose with their relationships to each other and to the group being governed by the Association's constitution and the bylaws or rules adopted pursuant thereto, and by the common law, and as a member of the group the plaintiff was jointly responsible with all other members for the actions of the group itself, and as a principal he had no cause of action against his co-principals for the wrongful conduct of their common agent. It cannot be successfully argued that the holding thus an-

nounced can be extended so as to control the decision in the present suit. The court apparently adopted the theory that the Brotherhood defendants were not in fact and in law the plaintiff's agents. The court said:

> "• • • It is universally recognized that an agent stands in a fiduciary relationship to his principal and is under a duty to be careful, skillful, diligent and loyal in the performance of his principal's business and that for a failure so to act he subjects himself to liability to his principal, 2 Am. Jur., Agency, §§ 251,252,274; 3 C.J.S., Agency, §§ 138,155, 162,172,286; 2 Restatement Agency, §§ 379,387,399. Since the complaint here charged these defendants with negligence, carelessness, fraud and breach of trust and made appropriate allegations of fact in support thereof, it necessarily follows that a good cause of action was pleaded, if these defendants were in fact and in law his agents."

It does not appear that a conspiracy had been entered into between the railroad and Brotherhood, as alleged in the present case, to deprive the plaintiff of the right to work or that the Brotherhood participated in a wrongful act against the plaintiff.

The case of Frederick Duplis v. Rutland Aerie No. 1001, Fraternal Order of Eagles, 118 Vt. 440, 111 A. 2d 727 (1955), relied upon by petitioners, was an action in tort to recover damages for injuries suffered by the plaintiff, a member of the defendant, Fraternal Order of Eagles. The injuries were sustained when the plaintiff tripped and fell on the stairway while leaving the defendant's premises. The court in upholding the action of the trial court in sustaining defendant's general demurer to plaintiff's petition, held,

in effect, that the plaintiff, having admitted in his pleadings and in oral argument that the defendant was an unincorporated association, and that at all material times the officers and agents were co-members with the plaintiff, that the trial court properly sustained the contention that the alleged acts of negligence of the agents were imputed to all members, including plaintiff, thereby precluding a recovery.

The facts as revealed by the pleadings in the present case bring it within the rule announced in cases where membership in a voluntary association has once been acquired, protection against expulsion or the deprivation of the right to work will be afforded by the courts. See Lundine v. McKinney, Tex. Civ. App., 183 S.W. 2d 265, no writ history; Dingwall v. Amalgamated Association, etc., 4 Calif. App. 565, 88 P. 597; 3 California Jurisprudence, 350, par. 5; Taxicab Drivers Local v. Pittman, (Okla. S.Ct. 1957), 322 P. 2d 159, 41 LRRM 2045; Selles v. Local 174 of International Brotherhood of Teamsters, etc., (Washington S. Ct. 1957), 50 W. 2d 660, 314 P. 2d 456, 40 LRRM 2573.

Since no evidence was presented at the hearing on the plea in abatement, the allegations contained in Borden's pleadings must be taken as true. The pleadings show that Borden was as effectively deprived of the right to work on the Republic National Bank job as if he had been expelled from membership. The fact that he worked on other jobs does not change the situation. The Constitution and Bylaws of the Association were not introduced in evidence. However, we must assume, in the light of the pleadings, that Borden, in gaining

membership, did not contract and agree to be bound by acts which would deprive him of the right to work. As was held in the Dingwall case, supra, "* * * Membership in a social or beneficial association is in itself a personal right, especially when the purposes of the association include the amelioration or improvement of the condition under which the members obtain their livelihood, and the holder of such right is entitled to be protected in its enjoyment against any unauthorized act or proceeding on the part of his fellow members, either as individuals or in their official or collective capacity, by which his enjoyment of such right will be impaired or destroyed."

It cannot be successfully said that the agents of the labor unions in depriving Borden of the right to work on the Republic National Bank job were acting as agents on behalf of Borden. On the other hand, it should be noted that in the Allen case, supra, the agent was acting in the performance of his duty on behalf of the plaintiffs in such manner that the plaintiffs could reasonably expect to benefit just as much as any other member. As the inception of the controversy, the matter in dispute was left to the agent. That agent was acting in behalf of the plaintiffs. Here we have, as pointed out above, quite a different situation. One of the "essential ingredients is that the act complained of should be done by the agent on behalf of the complaining member." See Bonson v. Musicians' Union (1955 House of Lords), 3 W.L.R. 788, 3 All E.R. 518; Taxicab Drivers Local v. Pittman, supra.

The agents of the union in the present case were not Borden's agents for the purpose of denying him the right to

work on the Republic National Bank job. In the Pittman case, supra, the Court said: "Common sense leads inexorably to the conclusion that officers of the Union causing plaintiff to be suspended from work without pay are anything but his agent for the purpose. The contrary conclusion would smack of flagellantism, an unlikely theory upon which to determine legal liabilities. The use of the agency doctrine under these specific circumstances has no support either in reason or public policy." The reasoning in the Pittman case applies with equal force here.

This case has not been decided on its merits. The majority recognizes this fact, but proceeds to instruct the trial court how it should rule in the event it should appear that the denial to respondent of an opportunity to work on the Republic Bank Building, even though wrongful, resulted merely from negligence, et cetera. It is sufficient for this Court to confine its opinion to the questions presented as the result of the error of the trial court in sustaining the plea in abatement.

The respondent is entitled to a trial, and it will be for the trial court to direct that trial. I join in affirming the judgment of the Court of Civil Appeals.

Clyde E. Smith
Associate Justice

Nov 4—1959

Opinion of the Court of Civil Appeals
Delivered July 25, 1958

H. N. BORDEN,

Appellant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, et al.,

Appellees.

On Rehearing from a District Court of Dallas County.

Our opinion heretofore delivered in this case is withdrawn and the following opinion is substituted.

This is a damage suit brought in the 101st District Court of The State of Texas against two unincorporated labor unions by H. N. Borden, appellant, who alleges that he is a member of both organizations. The two organizations are United Association of Journeymen and Apprentices of the Plumbing and Pipefitting industry of the United States and Canada, and Local Union 100 of said Association.

The trial court dismissed the suit on the grounds that (1) appellant "is a member of defendant labor organizations and thus has no standing to sue said organizations for money damages; and (2) "jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the exclusive jurisdiction of the National Labor Re-

lations Board under the Federal Labor Management Relations Act, and accordingly this court is without jurisdiction."

In his petition appellant makes the following allegations: on September 15, 1953 he was promised a job in the construction of the Republic National Bank Building in Dallas, Texas, by Farwell Construction Company through the Company's superintendent and also one of the Company's foremen; appellant thereupon obtained a clearance from his local union in Galveston, Texas, where he then lived, came to Dallas, presented himself to Local Union 100 at Dallas for the purpose of being accepted in order that he might go to work on the job promised by Farwell Construction Company; Local Union No. 100 at first refused to accept appellant's clearance card, but finally on October 9, 1953 did accept said clearance card; nevertheless said Local Union No. 100, in violation of Art. 5207a V.A.C.S., did then and has since continued willfully, maliciously, discriminatorily and without cause to refuse to allow appellant to go to work on the job offered him in the construction of the Republic Bank Building; appellant thereafter sought redress by submitting his claims to appellee unions at a meeting held October 18, 1954, but no remedy was offered to him by either union—in fact only a threat made against him that if he should continue his complaint he would be expelled from the unions; appellant then sought and obtained employment elsewhere at a wage less than he would have been paid on the Republic National Bank job; and that the difference in wages during the period of time involved was

$4,039.50. Appellant asked judgment for $4,039.50 damages for lost earnings, $5,000.00 as damages for mental anguish and suffering, and $1,000.00 as exemplary damages.

The only questions before us on this appeal are: (1) whether appellant had a right to sue appellee unions of which he was a member; and (2) whether such suit might be brought in a State court of the State of Texas.

The two labor unions, though unincorporated, are legal entities subject to being sued. International Association of Machinists v. Gonzales, 78 S. Ct. 923; United Mine Workers of America v. Coronado Coal Company, 259 U. S. 344, 66 L. ed. 975, 42 Sup. Court. 570. In International Longshoremen and Warehousemen's Union, Decisions and Orders of N.L.R.B. Vol. 79, p. 1508, Note 40, (1948), it is said:

> "The common law concept of an unincorporated labor organization as a group of individuals having no separate entity apart from its members has been discarded to the extent that it was not already outmoded in modern jurisdiction—by the Labor Management Relations Act, 1947. It is clear that the Act treats labor organizations for all practical purposes as juridical entities."

The action may be a suit for damages. International Association of Machinists, et al., v. Gonzales, (Sup. Court of United States, May 26, 1958); 78 S. Ct. 923; Selles v. International Brotherhood of Teamsters, etc., 314 P. 2d 456.

In this case appellant is asserting a property right—the right to seek employment, work, and earn a living. Inter-

national Printing Pressman and Assistants' Union of North America v. Smith, 198 SW 2d 729; 145 Texas 399; Gurtow, et al., v. Williams, et al., 105 SW 2d 328. Under the circumstances he has a right to sue the labor unions though he is a member of the unions. Choate v. Grand International Brotherhood of Locomotive Engineers (Sup. Court of Texas, July 9, 1958); Lundine v. McKinney, 183 SW 2d 265; McCantz v. Brotherhood of Painters, Decorators and Paperhangers, 13 SW 2d 902; Dusing v. Nuzzo, 29 N.Y.S. 2d 882; Nissen v. Int. Brotherhood, 141 A. L. R. 598, 610; Art. 5154G, Secs. 4 and 3, V.A.C.S.; Art. 5207a V. A. C. S. Appellant's first point on appeal is sustained.

With reference to appellant's second point on appeal, it is the contention of appellee that the National Labor Relations Board has exclusive jurisdiction of appellant's claim, hence suit may not be brought in a State Court. Appellee relies on 29 U.S.C.A. Sec. 158 (b) (2), Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act.

We are unable to agree with appellee. Appellant's suit is a tort action for damages. The National Labor Relations Board does not have jurisdiction of such claims. In United Construction Workers v. Laburnum Const. Corp., 347 U. S. 656: 74 Sup. Court 833, it is said:

> "Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no reg-

ulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state Courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occured in Garner v. Teamsters Union, 346 U.S. 485, 74 S. Ct. 161, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. * * * * *Congress has neither provided or suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct.* For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act. * * * * *The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay.*" (emphasis ours).

We hold that the State Court has jurisdiction of appellant's suit. Choate et al., v. Grand International Brotherhood of Locomotive Engineers (S.Ct. of Texas, July 9, 1958); International Association of Machinists v. Gonzales, 78 S.Ct. 923; United Automobile Workers v. Russell, 78 S. Ct. 932; Selles v. Local 174, International Brotherhood of Teamsters, etc., 314 P. 2d 456; Baun v. Lumber & Sawmill Workers Union, etc., 284 P. 2d 275. Appellant's second point on appeal is sustained.

The judgment of the trial court is reversed and the cause is remanded for trial on the merits.

REVERSED AND REMANDED.

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DIXON, Chief Justice.

Delivered July 25, 1958.

Opinion of the Court of Civil Appeals
Delivered April 11, 1958

H. N. BORDEN,

Appellant,

v.

UNITED ASS'N. OF JOURNEYMEN & APPRENTICES, et al.,

Appellees.

From a District Court of Dallas County.

This is a damage suit. The appellant is a member of the appellees who are unincorporated labor unions. He brought suit against such unions for damages growing out of a dispute wherein it is alleged that the appellant was arbitrarily and maliciously disallowed by said appellees to be employed by Farwell Construction Company, which had offered appellant an opportunity to work. Appellees filed a plea in abatement based on two counts: (1) That a member is not allowed to sue the union, and (2) the actions complained of were within the exclusive jurisdiction of the Labor Management Relations Act. On hearing before the court the plea in abatement was sustained on both counts and the cause dismissed. This appeal has been duly perfected from such judgment and order, appellant here briefing two points of error.

Point 1 in substance asserts error in the trial court's holding that a member of an unincorporated union cannot

sue the union for money damages since not legally allowed to do so. Countered in substance by the union that a member has no standing to sue it for money damages allegedly arising from dereliction of an agent of the union.

The general rule is that an employee cannot sue his union. However there are exceptions to the general rule. Three necessary facts must be established before such suit can be maintained, to-wit: (a) A property right or its equivalent must be involved; (b) a violation of the Constitution or Charter in the acts complained of must be shown: and (c) a resort to the internal processes of the organization for redress must have been exhausted or shown to be futile. Ducing v. Muzzo, 29 NYS 2d 882. Ordinarily hardship to the member is not in issue and acts in conformity with the Constitution and rules of the union are ordinarily enforcible. The record here shows no complaint by Borden against the agent of the union who is alleged by Borden to have wronged him. In Brotherhood of Railroad Trainmen v. Allen, 230 S.W. 2d 235, error ref., cert. den. 340 U. S. 934, 71 S. Ct. 501, rehearing denied 341 U. S. 906, 71 S. Ct. 611, it is held that:

"If Weiss and Andrews, or either of them, committed any fraud or failed in his or their duty to properly represent the appellees and as the result of which they sustained damages, they could be held accountable to the appellees therefor, because a principal can sue his agent for such dereliction of duty. This principal is so well established that it needs no authorities cited to support the same. The appellee's comembers, if they received money to which they were

not entitled but to which the appellees were, the appellees would have a cause of action against members as individuals. The appellees and the other several hundred thousand members are principals, and we are of the opinion that one or more principals cannot sue their coprincipals and require them to respond in damages for the dereliction of duty as a joint agent. Weiss and Andrews were just as much the agents of appellees as they were the agents of the other members of the brotherhood. The Brotherhood being a benefit fraternal society, its assets are held jointly between all of its members, including the appellees, and they say that only twenty members received a part of the award that they were not entitled to. None of the other several hundred thousand members received any part of the fund, nor did they take any part in its distribution; and to require them to bear a proportionate part of the loss sustained by the appellees from the dereliction of the joint agents of all in order that they might receive the full amount that they claim they were entitled to received under the agreement, is not a sound legal principle. To hold otherwise it would furnish a means by which the Brotherhood could be destroyed by one or more of its own members. They are, in effect, suing themselves (Citing cases)." See 87 C.J.S. 867, note 11 citing above case.

Appellant Borden not having shown facts necessary to bring his claim within the exceptions before he can sue the unions, he cannot recover. The holding in the Allen case is applicable here. Point 1 is overruled.

Point 2 asserts error in holding the acts complained of by Borden are within the jurisdiction of the National Labor Relations Board under the Federal Labor Management Relations Act, since the acts complained of by Borden are not within the coverage of such Act. Countered that the NLRB has exclusive jurisdiction of a claim by a workman based on the *union's attempt to wrongfully deprive him of employment.*

Local Union 100 by way of abatement asserts that the matters here involved are within the exclusive jurisdiction of the NLRB under the FLMR Act of 1947 (Taft-Hartley Act) which provides it is an unfair labor practice for the union or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *." And that such preempted the field and deprives the State Courts of jurisdiction here and that Borden has not sought or exhausted such available remedies; also pled the same reasons and facts as exceptions, and as defense on the merits.

The acts complained of in the pleadings were that the union accepted his clearance card, but then and thereafter has wrongfully and discriminately refused to allow him to go to work on the Republic Bank Building without any cause whatsoever, which constituted an interference with

his right to contract and his inherent right to labor; that such acts of this Local 100 constituted a monopoly through restraint of his free pursuit of the lawful trade or occupation which was unreasonable and unjustified; that he submitted his complaint to the unions at a meeting on December 18, 1954, but no remedy was offered him—only a threat that if he continued to complain he would be discharged from the union, all in violation of Art. 5207a V.A.C.S.,; which constituted an interference with and denial of his right to work and bargain freely with his employer; pled specifically a loss of job opportunities in the sums set out and sought actual damages totaling $4,039.50 and $10,000.00 exemplary damages. Also pled he did not take such job opportunities because of the threatened expulsion and because of failure of union clearance.

Borden contends that he complains of malicious and discriminatory and willful acts of the unions in refusing to allow him to pursue his employment even after they knew of the occurrences complained of; that his employment, although he had the job opportunity, was never consummated because of the union's threatened expulsion based on his failure to get union clearance.

The union contended that the acts asserted by Borden were within sec. 158(b)(1) and 158(b)(2) of the FLMR Act and that such Act preempts the field so as to deprive State Courts of jurisdiction which in substance provides that a union or its agents shall not interfere with the rights guaranteed by sec. 157; that sec. 157 gives employees the right of self organization, to form, join or assist organiza-

tions to bargain collectively and to engage in other concerted activities, or for any other mutual benefit; also gives the employee the right to refrain from such authorized acts except to the extent that such right might be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized by sec. 158(a)(3), Title 29 USCA. Sec. 158, Unfair Labor Practices. Sec. 158(a)(2) provides that it shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment to encourage or discouage membership in any labor organization.

Section 158(b)(1) and 158(b)(2) provide that it shall be an unfair practice for a labor organization, or its agents, (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in sec. 157, and this title provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representative for the purpose of collective bargaining or the adjustment or grievances. (2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to when membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The record here shows that the employer placed a call for Borden and it was thereafter that the unilateral acts of

the agents of the union solely caused Borden's failure to work on the job involved. There was no issue of conspiracy raised by the evidence, and the matters involved in this action are, in our opinion, within the coverage of the Labor Management Relations Act. Point 2 is overruled.

Appellee has briefed a counterpoint numbered three, in substance that the Court of Civil Appeals lacks jurisdiction by reason of appellant's failure to perfect his appeal by timely filing an appeal bond.

The transcript shows the final judgment was entered February 15, 1957 and the bond bears the District Clerk's filemark of March 12, 1957, and the certificate of approval of the bond by the District Clerk is also dated March 12, 1957. The appeal bond was therefore duly perfected under Rule 356, R.C.P.

The appeal bond here involved having been filed within the time required in Rule 356, R.C.P., and approved by the District Clerk, even though defective, perfected the appeal. If defective, it was subject to amendment any time the question should be raised, and, if properly amended, such amendment relates back to the date of the filing of the original bond. The counterpoint is overruled.

Finding no reversible error in the trial court's judgment, it is

AFFIRMED.

CRAMER

Associate Justice.

Delivered April 11, 1958

APPENDIX B

Order of the Supreme Court Refusing Application for Writ of Error.

In the Supreme Court of Texas

No. A-8993

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES et al.

v.

H. N. BORDEN

From Dallas County, Fifth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Local 100 of the United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada, and its surety, National Surety Corporation, pay all costs incurred on this application.

- - - - - -

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a

true and correct copy of the judgment or order of the Supreme Court of Texas on application for writ of error in the case of Local 100 of The United Association of Journeymen & Apprentices et al. vs. H. N. Borden, No. A-8993, from Dallas County, Fifth District, as such judgment or order appears of record in the minutes of said Court under date of July 25, 1962.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 1st day of October, A. D. 1962.

GEO. H. TEMPLIN, Clerk
By /s Carl B. Lyda
Deputy.

(SEAL)

APPENDIX C

Trial Court Judgment and Jury Verdict

(Tr. 106-120)

No. 2803

In the 101st Judicial District Court of Dallas County, Texas

H. N. BORDEN

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA
AND
LOCAL UNION 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA

JUDGMENT

ON this the 18th day of July, 1960, the above entitled and numbered cause coming on for trial in its regular order, came the parties and announced ready for trial, and, a lawful jury being duly called, selected and sworn for the trial of said cause, the pleadings and evidence were heard by the Court and the jury, and at the conclusion of the evidence, the Defendant filed its motion for directed verdict, and, the Court being of the opinion that Judgment should be entered, as a matter of law, for the Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, the Court

gave the jury a peremptory instruction to return a verdict for the Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and such verdict being rendered in obedience to the instruction, it is therefore ordered, adjudged and decreed that Plaintiff take nothing by his suit against Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and that said Defendant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada recover of Plaintiff its costs in this behalf expended and go hence without day, to which action of the Court the Plaintiff then and there in open court excepted and gave Notice of Appeal to the Court of Civil Appeals for the 5th Supreme Judicial District sitting at Dallas, Texas; and the Court being of the opinion that the motion for directed verdict on behalf of Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada should be in all things overruled, the Court did thereupon overrule such Motion of Defendant Local 100 and submit the case to the jury upon Special Issues, and the jury, on their oath, do, for their verdict, and in response to the following Special Issues, Definitions and explanatory instructions submitted to them by the Court on July 21, 1960, make the following respective findings:

This case is submitted to you upon Special Issues in the form of questions. In arriving at your answers to these Spe-

cial Issues, there are standards of conduct to be followed, and rules of propriety to be obeyed, which, if disregarded, could make a nullity of these proceedings, and all our efforts could be wasted:

1. You will not be concerned with the effect of your answers, nor the judgment that the Court may render after considering your answers. Neither should you speculate upon who might win or lose the case by such answers.

2. Your answers should be determined without bias, prejudice, sympathy, resentment or any other emotion, except to honestly reflect your findings to the question asked.

3. It is always improper to speculate about, consider, discuss or even mention costs of litigation, attorney's fees, or any other similar matter not shown by the evidence.

4. You should not mention—nor testify to—any personal knowledge, or information you may have about any fact or person connected with this case, which is not shown by the evidence.

5. When words used in the issues are not used in their ordinary meaning, or have a particular meaning, a proper definition of such words will be submitted to you. You will accordingly receive the law of this case only from the Court as given you in this charge and be governed thereby.

6. You are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony.

7. By the term "wilfully", as used in this charge, is meant the intentional and purposeful disregard of the known rights of another.

The questions asked are usually begun with the phrase, "Do you find from a preponderance of the evidence" that a certain event, act, omission or transaction took place. A "preponderance of the evidence" is defined in the law as the greater weight and degree of credible testimony.

By the term "mental anguish" as used in this charge, is meant the intense pain of body or mind and a high degree of mental suffering and not mere disappointment or regret. The emotion of anger is not classed as mental suffering.

By the term "authorized" as used in this charge is meant that which is done by one in the interest of another by his authority or with his consent.

By the term "detriment" as used in this charge is meant any loss or harm suffered in person or property.

SPECIAL ISSUE NO. 1:

Do you find from a preponderance of the evidence that on or about September 15, 1953, the Plaintiff H. N. Borden was promised a job on the construction of the Republic Bank Building in Dallas, Texas, by the authorized foreman, if any, of the Farwell Construction Company?

Answer "Yes" or "No"

ANSWER: Yes

SPECIAL ISSUE NO. 2:

Do you find from a preponderance of the evidence that at a time when the Plaintiff was available for work, if he was, a call was placed by A. G. Thurman calling for Plaintiff to go to work upon the Republic National Bank Building?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered the above Special Issue No. 2 "Yes", and in that event only, then answer Special Issue No. 3.

SPECIAL ISSUE NO. 3:

Do you find from a preponderance of the evidence that the Defendant Local Union 100 by and through its business manager, Cleo Lanham, thereafter refused to accept the Plaintiff's clearance card from his local union in Shreveport, Louisiana?

Answer "Yes" or "No"

ANSWER: NO.

If you have answered the above Special Issue No. 3 "Yes" and in that event only, then answer Special Issue No. 4:

SPECIAL ISSUE NO. 4:

Do you find from a preponderance of the evidence that in refusing such clearance card of Plaintiff, (if you have so found), that the said Cleo Lanham did in his capacity as

Business Manager of Defendant Local Union 100 act wilfully, as that term is herein defined?

Answer "Yes" or "No"

ANSWER
(NOT ANSWERED)

SPECIAL ISSUE NO. 5:

Do you find from a preponderance of the evidence that the said Defendant Local Union 100, acting by and through Cleo Lanham, wilfully refused to let the Plaintiff work on said Republic National Bank Building?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered the above Special Issue No. 5 "Yes", and in that event only, then answer Special Issues Nos. 6 and 7.

SPECIAL ISSUE NO. 6:

Do you find from a preponderance of the evidence that such refusal, if any, was made at a time when said Cleo Lanham knew, if he did, that under the rules of said Local Union, if any, the Plaintiff was entitled to work on said Bank Building?

Answer "Yes" or "No"

ANSWER: Yes

SPECIAL ISSUE NO. 7:

Do you find from a preponderance of the evidence that such refusal to let the Plaintiff work on said Republic

National Bank Building, if you have so found, was without any cause or reason whatsoever?

Answer "Yes" or "No"

ANSWER: No.

SPECIAL ISSUE NO. 8:

Do you find from a preponderance of the evidence that with full knowledge of the conduct of Cleo Lanham, if any, concerning Plaintiff, the officers and members of the said defendant Local Union 100 approved such conduct?

Answer "Yes" Or "No"

ANSWER: Yes

SPECIAL ISSUE NO. 9:

What sum of money, if any, do you find from a preponderance of the evidence that the Plaintiff would have earned if he had been allowed to work on the Republic National Bank Building during the time from September 15, 1953 to September 15, 1954?

Answer as to the amount in dollars and cents, if any; otherwise, let your answer be "None".

ANSWER: $5,856.00

SPECIAL ISSUE NO. 10:

What sum of money do you find from a preponderance of the evidence that the Plaintiff did earn, or by the use of reasonable diligence could have earned, during the same

period of time from September 15, 1953 to September 15, 1954?

Answer as to the amount in dollars and cents.

ANSWER: $3,940.00

SPECIAL ISSUE NO. 11:

Do you find from a preponderance of the evidence that the Plaintiff, by being denied the job opportunity on the Republic National Bank project by Defendant, Local Union 100, if you have so found that he was denied such job opportunity, suffered any mental anguish?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered Special Issue No. 11 "Yes", and only in that event, you will answer the following Special Issue; otherwise you need not answer same.

SPECIAL ISSUE NO. 12:

Do you find from a preponderance of the evidence that said Defendant's denial of the job opportunity to Plaintiff in the Republic National Bank project, if you have so found that Defendant did deny Plaintiff such job opportunity, was a proximate cause of Plaintiff's suffering mental anguish, if any?

Answer "Yes" or "No"

ANSWER: Yes

In connection with the above Special Issue No. 12, you are instructed that by the term "Proximate Cause" is meant that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which the event would not have occurred; and to be a proximate cause of an event it should be such as that it could have been reasonably anticipated and foreseen by a person of ordinary prudence in the exercise of ordinary care that the event, or some similar event, would have resulted from such cause as a natural and probable consequence, in the light of the attending circumstances.

If you have answered the above Special Issue No. 12 "Yes", and in that event only, then answer Special Issue No. 13.

SPECIAL ISSUE NO. 13

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the Plaintiff for the mental anguish, if any, suffered by him by virtue of being denied the work to work on the Republic National Bank project by Defendant Local Union 100, if you have so found that he was denied such job opportunity?

Answer as to the amount, if any, in dollars and cents; otherwise let your answer be "None".

ANSWER: $1,500.

SPECIAL ISSUE NO. 14:

From a preponderance of the evidence, what sum of money, if any, do you award the Plaintiff against the

Defendant Local Union 100 as punitive damages, if any?

Answer as to the amount, if any, in dollars and cents; otherwise let your answer be "None".

ANSWER: $5,000.00.

In connection with the above Special Issue No. 14, you are instructed that by the term "punitive damages" is meant damages which are assessed against the Defendant for the purpose of punishing it and also for the purpose of setting a wholesome example, if any, to others.

SPECIAL ISSUE NO. 15:

Do you find from a preponderance of the evidence that after having been refused the opportunity to work on said Republic National Bank Building, if he was, the Plaintiff failed to pursue his grievance, if any, within the rules and procedures of said Local Union 100 that were available to him, if any were available?

Answer "He did fail" or "He did not fail"

ANSWER: He did fail.

SPECIAL ISSUE NO. 16:

Do you find from a preponderance of the evidence that in October, 1953, the Plaintiff voluntarily accepted work upon referral from Defendant without any complaint?

Answer "Yes" or "No"

ANSWER: Yes

If you have answered Special Issue No. 16 "Yes" and in that event only, then answer Special Issue No. 17.

SPECIAL ISSUE NO. 17:

Do you find from a preponderance of the evidence that the Plaintiff acquiesced in Defendant Local Union 100's actions?

Answer "Yes" or "No"

answer "No

By the term "Acquiesce" as used in the foregoing issue, you are instructed that it means a voluntary acceptance or consent by remaining silent or omitting to object. If you have answered the above and foregoing Special Issue No. 17 "Yes" and in that event only, then answer Special Issue No. 18.

SPECIAL ISSUE NO. 18:

Do you find from a preponderance of the evidence that the said Defendant relied upon the Plaintiff's acquiescence, if any, to its detriment?

Answer "Yes" or "No"

ANSWER:
(Not Answered)

SPECIAL ISSUE NO. 19:

Do you find from a preponderance of the evidence that the Plaintiff failed to apprise the Defendant Local Union 100 of his complaints?

Answer "Yes" or "no"

ANSWER: No.

If you have answered the above Special Issue No. 19 "Yes" then in that event only, answer Special Issue No. 20.

SPECIAL ISSUE NO. 20:

Do you find from a preponderance of the evidence that such failure, if you have so found, amounted to inexcusable neglect?

Answer "Yes" or "No"

ANSWER:
(NOT ANSWERED)

In connection with the above and foregoing Special Issue No. 20, you are instructed that by the term "inexcusable neglect" is meant such delay as a reasonably prudent person would in no event have exercised under the same or similar circumstances. If you have answered the foregoing Special Issue No. 20 "Yes" and in that event only, then answer Special Issue No. 21.

SPECIAL ISSUE NO. 21:

Do you find from a preponderance of the evidence that such inexcusable neglect, if any, worked a disadvantage to the Defendant, Local Union 100?

Answer "Yes" or "No"

ANSWER:
(NOT ANSWERED)

SPECIAL ISSUE NO. 22:

Do you find from a preponderance of the evidence that it would have been useless for Plaintiff to have pursued his

complaint, if any, within the rules and procedures, if any, of said Defendant Local Union 100?

Answer "Yes" or "No"

ANSWER: Yes

After you retire to your jury room, you should select one of your members as your "Foremen". It is his duty:

1. To preside during your deliberations,

2. To see that your deliberations are conducted with propriety,

3. Communicate with the Court *IN WRITING* on any matter requiring further instruction or assistance,

4. Vote with you upon each issue,

5. Write your answers to the issues in the spaces provided; and

6. To certify to your verdict in the certificate attached to this page.

Your answers must be by unanimous vote. In voting upon your answers, you may do so orally, in writing, by show of the hands, or in any other fair manner convenient to you; but you must not reach a verdict by lot, chance nor trading upon your answers.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge, and he can only inquire if you have agreed upon a verdict.

When you have answered all of the foregoing questions as requested, and your Foreman has placed your answers in the spaces provided, you will advise the officer in charge at the door of the jury room that you have reached a verdict, whereupon you will return into court with your verdict.

A. R. STOUT /S/
JUDGE PRESIDING. Judge of
40th Judicial District
Sitting for Judge of 101st
Judicial District.

WE, THE JURY, HAVE ANSWERED THE ABOVE AND FOREGOING SPECIAL ISSUES AS HEREIN INDICATED, AND HEREWITH RETURN THEM INTO COURT AS OUR VERDICT.

/s/ CLARE G. WEAKLEY, JR.
FOREMAN.

(And the following communication and answer of the Court)

I have received your communication reading as follows: "Issue #7

Does 'without any cause or reason' mean without any reason whatsoever (personal or otherwise) or does it mean without reason according to the union by laws?

Clare G. Weakley, Jr.
Foreman

in answer to such communication, you are instructed that:

It means a cause or reason which was actuated by an intent that was not in good faith. A denial, even though errone-

ous, which resulted merely from negligence, inadvertence or mistake would not be without any cause or reason whatsoever.

/s/ A. R. STOUT
Judge Presiding

Which findings were received by the Court and were filed and entered of record on the Minutes of such Court.

And the Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada having filed its Motion for Summary Judgment and having presented the same to the Court prior to the commencement of the trial of this cause, and the Court having carried the said Motion along until such time as all of the evidence was adduced by both Plaintiff and Defendant, and the Court being of the opinion that the said Motion should be in all things overruled, said Motion of Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is hereby in all things overruled.

Whereupon Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada filed its Motion for Judgment on the Verdict of the Jury, and in the alternative for Judgment non obstante veredicto, and Plaintiff made his Motion for the Court to disregard certain Special Issue jury findings and for Judgment based upon the remainder of the verdict of the jury and, after

reasonable notice thereof, all parties appeared by their respective attorneys. The Court having heard and considered said Motions and being of the opinion that the Motion of Plaintiff should be granted (except as herein limited) and that the Motions of Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada should be overruled:

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Motions by Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada be and the same are in all things overruled, and the Motion filed by Plaintiff to disregard certain Special Issue Jury findings (being particularly Special Issue No. 7, which is not a controlling issue) and to enter judgment on the remainder of the jury verdict is hereby granted as hereinafter limited and stated:

And the Court having considered the verdict, and being of the opinion that Plaintiff is not entitled to recover any sum for mental anguish in a suit of this type and that such issue was not raised by the law and the evidence and should not have been submitted, and being further of the opinion that the punitive damages found by the jury are unjust and excessive under the facts and that the plaintiff should be required to remit to the extent that such punitive damages not exceed the actual damages awarded, to which said Plaintiff has agreed and does remit and assent subject to its right to

complain in the event of an appeal by the said defendant, the court is therefore of the opinion that judgment should be rendered for the Plaintiff as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff H. N. Borden do have and recover of and from Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada the sum of Three Thousand Eight Hundred Thirty-two Dollars ($3,832.00), together with interest thereon at the rate of Six (6) per cent per annum from this date until paid, and all costs of suit, for which let execution issue.

To which action and judgment of the Court in first, overruling its Motion for Summary Judgment and for Judgment on the Verdict of the Jury and in the alternative its Motion for Judgment non obstante veredicto, and, second, in sustaining the Motion of Plaintiff to disregard certain Special Issue jury findings and for judgment on the remainder of said jury verdict, and in entering this Judgment, Defendant Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, then and there in open court excepted.

And to which action of the Court in first refusing to allow him any sum for mental anguish when, in response to the Special Issue inquiry as to mental anguish the jury answered $1,500.00; and second in granting the Motion for Directed Verdict of Defendant United Association of Journeymen and

Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plaintiff then and there in open court excepted.

SIGNED AND ENTERED THIS 3rd day of October, 1960.

A. R. Stout /s/
JUDGE PRESIDING
JUDGE 40TH JUDICIAL DISTRICT COURT SITTING FOR JUDGE 101ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

APPROVED AS TO FORM:

MULLINAX, WELLS, MORRIS & MAUZY
Attorneys for Defendants
By: L. N. D. Wells, Jr. /s/

LYNE, BLANCHETTE, SMITH & SHELTON
Attorneys for Plaintiff
By: Robert W. Smith /s/

ENDORSEMENT ON INSTRUMENT No. 2803
H. N. Borden vs. United Association of Journeymen et al
JUDGMENT
Recorded: Vol. LL, Page 415
In the Minutes of the 101st Judicial District Court

APPENDIX D

Excerpts from Record of Defendant's Pleadings Indicating Proper and Timely Raising of Federal Question

EXCERPT FROM ORIGINAL ANSWER OF LOCAL UNION 100, filed Sept. 24, 1955

The matters of which plaintiff complains are matters within the exclusive jurisdiction of the National Labor Relations Board pursuant to the Federal Labor Management Relations Act of 1947 (Taft-Hartley), which statute provides in pertinent part that it is an unfair labor practice for a labor organization or its agents:

> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *"

The cited federal legislation pre-empts this field and deprives this Honorable Court of the State of Texas of jurisdiction to hear and determine the matters alleged in plaintiff's petition for the reason that exclusive jurisdiction of said matters are, by the federal statute, lodged in the federal administrative agency and the federal court, and plaintiff has wholly failed to seek, utilize, or exhaust remedies available before the federal agency and federal court under the federal law.

WHEREFORE, defendant local union 100 respectfully prays that this Plea in Abatement be granted and that this suit be in all things abated and dismissed as to this defendant, and for such other relief as to which this defendant may be entitled.

EXCERPT FROM FIRST AMENDED ANSWER OF DEFENDANT LOCAL UNION 100

filed July 6, 1960 (Tr. p. 22)

Pleading further, defendant would show that the construction of the Republic Bank Building affected interstate commerce, and that union's activities in connection therewith affected interstate commerce; that by the federal Labor Management Relations Act of 1947, as amended, (Taft-Hartley), the Federal Congress has pre-empted to Federal tribunals the jurisdiction of the matters alleged in plaintiff's amended petition to the exclusion of the jurisdiction of the courts of the State of Texas.

EXCERPT FROM MOTION FOR NEW TRIAL OF DEFENDANT LOCAL UNION 100

filed Oct. 13, 1960 (Tr. 141)

The Court erred in overruling defendant's plea to the Court's jurisdiction that the subject matter of this suit is preempted by federal law to the exclusive jurisdiction of federal tribunals.

APPENDIX E

Pertinent Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

ARTICLE VI.

Clause 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Labor-Management Relations Act, 1947

29 U.S.C., Sec. 152—Definitions

Sec. 2. When used in this Act—

* * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting

in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

29 U.S.C. Sec. 158. Unfair Labor Practices

29 U.S.C. 158(a). "It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

29 U.S.C. 158(b) "It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

29 U.S.C. Sec. 160. Prevention of Unfair Labor Practices

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may in-

volve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."